ISSUES ARISING IN CONNECTION WITH NARS V. TURNAGE

JOINT HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

AND THE

COMMITTEE ON VETERANS' AFFAIRS
U.S. SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

MARCH 17, 1987

Printed for the use of the Committees on Veterans' Affairs

Serial No. 100-4

U.S. GOVERNMENT PRINTING OFFICE
73-816 WASHINGTON : 1987

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S761-2
H761-16

COMMITTEE ON VETERANS' AFFAIRS

G.V. (SONNY) MONTGOMERY, Mississippi, *Chairman*

DON EDWARDS, California	GERALD B.H. SOLOMON, New York
DOUGLAS APPLEGATE, Ohio	JOHN PAUL HAMMERSCHMIDT, Arkansas
DAN MICA, Florida	CHALMERS P. WYLIE, Ohio
WAYNE DOWDY, Mississippi	BOB STUMP, Arizona
LANE EVANS, Illinois	BOB McEWEN, Ohio
MARCY KAPTUR, Ohio	CHRISTOPHER H. SMITH, New Jersey
TIMOTHY J. PENNY, Minnesota	DAN BURTON, Indiana
HARLEY O. STAGGERS, Jr., West Virginia	MICHAEL BILIRAKIS, Florida
J. ROY ROWLAND, Georgia	THOMAS J. RIDGE, Pennsylvania
JOHN BRYANT, Texas	JOHN G. ROWLAND, Connecticut
JAMES J. FLORIO, New Jersey	ROBERT K. DORNAN, California
KENNETH J. GRAY, Illinois	ROBERT C. SMITH, New Hampshire
PAUL E. KANJORSKI, Pennsylvania	JACK DAVIS, Illinois
TOMMY F. ROBINSON, Arkansas	
CHARLES W. STENHOLM, Texas	
CLAUDE HARRIS, Alabama	
JOSEPH P. KENNEDY, II, Massachusetts	
ELIZABETH J. PATTERSON, South Carolina	
TIM JOHNSON, South Dakota	
JIM JONTZ, Indiana	

MACK FLEMING, *Chief Counsel and Staff Director*

SENATE COMMITTEE ON VETERANS' AFFAIRS

ALAN CRANSTON, California, *Chairman*

SPARK MATSUNAGA, Hawaii	FRANK H. MURKOWSKI, Alaska
DENNIS DeCONCINI, Arizona	ALAN K. SIMPSON, Wyoming
GEORGE J. MITCHELL, Maine	STROM THURMOND, South Carolina
JOHN D. ROCKEFELLER IV, West Virginia	ROBERT T. STAFFORD, Vermont
BOB GRAHAM, Florida	ARLEN SPECTER, Pennsylvania

Jonathan R. Steinberg, *Chief Counsel/Staff Director*
Anthony J. Principi, *Minority Chief Counsel/Staff Director*

CONTENTS

March 17, 1987

Page
Joint Oversight Hearing on Issues Arising in Connection with Nars v. Turnage 1

OPENING STATEMENTS

Bryant, Hon. John 11
Cranston, Hon. Alan, chairman, Senate Committee on Veterans' Affairs 12
  Prepared statement of Chairman Cranston 105
Edwards, Hon. Don 7
Evans, Hon. Lane 9
Florio, Hon. James J. 10
  Prepared statement of Congressman Florio 104
Mitchell, Hon. George J. 8
Montgomery, G.V. (Sonny), chairman, House Committee on Veterans' Affairs 1
  Prepared statement of Chairman Montgomery 89
Murkowski, Hon. Frank 4
  Prepared statement of Senator Murkowski 100
Rowland, Hon. J. Roy 14
Solomon, Hon. Gerald B.H., ranking minority member, House Committee on Veterans' Affairs 2
  Prepared statement Congressman Solomon 94

WITNESSES

Abrams, Ronald B., legal consultant, Veterans' Administration 35
  Prepared statement of Mr. Abrams 154
Boskovich, Barry S., staff consultant, Compensation and Pension Service, Department of Veterans Benefits, Veterans' Administration 37
  Prepared statement of Mr. Boskovich 159
Dunlap, Michael A., Veterans' Administration employee; accompanied by Peter Broida, esq., counsel 50
Erspamer, Gordon P. Erspamer, Esq., attorney for the National Association of Radiation Survivors; accompanied by Kay Hinkle 15
  Prepared statement of Mr. Erspamer 109
Ivers, Donald, General Counsel, Veterans' Administraton 59
  Prepared statement of Mr. Ivers 262
Kenny, Thomas J., staff consultant, Veterans' Administration 39
  Prepared statement of Mr. Kenny 168
Vogel, R. J., Chief Benefits Director, Veterans' Administration; accompanied by Don Zeglin, Deputy Assistant General Counsel 61

MATERIAL SUBMITTED FOR THE RECORD

Letters:

  Mr. Gerald P. Moore, Director, VA Compensation and Pension Service, to Director, Quality Review Committee, VARO, re SQC training 248
  VA General Counsel Donald L. Ivers to David C. Vladeck, Esq. Public Citizen Litigation Group, re Donald B. Abrams 284

Memos:

  "Documentation of Due Process—*NARS* v. *Walters*—Analysis—Suggested Actions" from Ronald A. Abrams, legal consultant, to Director, Compensation and Pension Service, Veterans' Administration 252

Page
Memos—Continued
"Proposed Budget for *NARS* v. *Turnage* Litigation," Civil Division, Justice Department 277
"Proposed Disposition of Radiation Exposure Claims," from Charles M. Johnston to VA Chief Benefits Director 281
"Radiation Exposure Claims—Service-Connected Compensation—Estimated Cost," from Dorothy L. Starbuck, VA Chief Benefits Director to VA Assistant General Counsel 282
"Appearance of VA Employees Before the House Veterans' Affairs Committee," from VA General Counsel Donald L. Ivers 286
"Allegations of Reprisals for Testimony in the Case of *NARS* v. *Turnage*," from VA General Counsel 333
Plaintiffs' suggested modification of notices and plans required by January 8, 1987, order:
Notice of Discovery Obligations (*NARS* v. *Turnage*) 136
Discovery plan of Veterans' Administration 140
Notice of pending court action 143
Reports:
Audit of VA Department of Veterans Benefits Statistical Quality Control for Benefits Authorizations 287
"Compensation and Pension Regional Office Quality as Measured by Central Office Quality Review" 235
"Procedural Due Process—Its Application to the Compensation and Pension Program" submitted by Mr. Ronald B. Abrams 173
"Documentation of Procedural Due Process," by Mr. Ronald B. Abrams 232
Statements:
Senator Alan Simpson 147
Senator Strom Thurmond 146
Senator Jay Rockefeller 150
Vietnam Veterans of America 353
Tables:
VA Central Office validation results 230
VA regulations:
Compensation and Pension, Transmittal Sheet No. 494 222
Due Process Package, No. 1103 225
Written committee questions and their responses:
Hon. Gerald B.H. Solomon to Ronald Abrams, VA Central Office 334
Hon. Gerald B.H. Solomon to Barry S. Boskovich, staff consultant, Compensation and Pension Service, Department of Veterans Benefits, Veterans' Administration 339
Hon. Gerald B.H. Solomon to VA Administrator Turnage 344
Hon. Gerald B.H. Solomon to VA Compensationa and Pension Service 347
Senator Alan Cranston to Gordon P. Erspamer, Esq., attorney for the National Association of Radiation Survivors 350
Senator Frank Murkowski to Ronald Abrams, VA Central Office 355
Senator Frank Murkowski to Assistant Attorney General John R. Bolton . 408
Senator Frank Murkowski to Gordon P. Erspamer, Esq., attorney for the National Association of Radiation Survivors 411

JOINT OVERSIGHT HEARING—ISSUES ARISING IN CONNECTION WITH NARS V. TURNAGE

TUESDAY, MARCH 17, 1987

House of Representatives and the
U.S. Senate,
Committees on Veterans' Affairs,
Washington, D.C.

The House and Senate committees met in joint session, pursuant to notice, at 9:30 a.m., in room 334, Cannon House Office Building, Hon. G.V. (Sonny) Montgomery (chairman of the House Committee on Veterans' Affairs) presiding.

Present: Representatives Montgomery (chairman), Edwards, Applegate, Evans, Kaptur, Penny, Rowland of Georgia, Bryant, Florio, Harris, Johnson, Solomon, Smith of New Jersey, Ridge, Rowland of Connecticut, and Smith of New Hampshire.

Senators Present: Senators Cranston, Mitchell, and Murkowski.

OPENING STATEMENT OF CHAIRMAN MONTGOMERY

The Chairman. The committee will come to order. We have most of the main players here this morning so we'll start.

We are meeting as a joint House/Senate committee to hear from witnesses who will answer questions regarding the fine imposed on the Veterans' Administration for its failure to comply with the civil discovery requests in the case of the *National Association of Radiation Survivors* v. *Turnage.*

I would say to my colleagues that even though this case is still before the courts, two of my colleagues on the committee came to me and urged that a hearing be held.

One thing should be stated for the sake of the witnesses and Members as well. This is not a hearing on judicial review. In reading the testimony of the first witness, it would appear that he thinks today's hearing concerns judicial review, and it appears that he intends to present testimony to that effect. The House committee held 4 full days of hearings last year receiving testimony from more than 30 witnesses on the issue of judicial review. I believe the House committee has heard about every argument for and against judicial review.

The major issue in the *NARS* case is whether the $10 limitation on fees paid to attorneys in handling veterans' claims is constitutional. The Supreme Court has decided that the law is constitutional on its face, but has allowed the district court to decide whether it might be unconstitutional as applied to the NARS plaintiffs.

As to whether the $10 limitation on attorney fees should be changed, many attorneys say we should leave the statute alone, that they will continue to take veterans' cases without charge. Others say that we need to change the attorney fee limit so there will be more incentives for lawyers to represent veterans. Just last year, a study was published by the Administrative Conference of the United States saying that the Government should be doing all it can to encourage nonlawyer representatives, much like we have with the representatives of the various veterans service organizations.

[The prepared statement of Chairman Montgomery appears at p. 89.]

The CHAIRMAN. Now, when he does come, I want to welcome the distinguished chairman of the Senate Veterans' Affairs Committee, Senator Cranston.

Also a distinguished member of this committee, the Chair is pleased to recognize the ranking minority member, Mr. Solomon of New York.

Mr. SOLOMON. Thank you, Mr. Chairman.

OPENING STATEMENT OF GERALD B.H. SOLOMON

Mr. Chairman, we meet here to receive information with respect to allegations made concerning the Veterans' Administration. That agency of Government and employees representing it have been the subject of a judicial finding in the State of California and the subject of press stories related to that finding.

Mr. Chairman, I trust we can all agree that our purpose here today should be very limited in scope. This is a very important matter. We have before us a letter from the Department of Justice explaining why its representatives will not be here today. To me, that letter is very persuasive. It states that "There is a general and well-established practice that litigants should avoid disrupting or prejudicing a case by prematurely disclosing matters to the media or attempting to try their case to the general public." I find that to be true in every instance.

Mr. Chairman, the basic allegations before us are that the VA deliberately shredded files and material called for in discovery motions related to the California court case; that the Veterans' Administration harassed an employee, or employees, who reported the alleged shredding to supervisors and to the California court; that the VA has an inept adjudicative procedure that involves "misconduct, misrepresentations, arbitrary power, manipulative practices, unwritten rules, hearing abuses", and other procedural and substantive irregularities; that the VA has policies that reward employees for productivity almost to the exclusion of quality considerations; and that the VA denied a promotion to a person who had been harassed and actually reprimanded him for his activities.

Mr. Chairman, let us determine today, as best we can, what adjudicative procedures exist in the VA. Let's determine, as best we can, what VA did or did not do with respect to shredding files. Let's determine, as best we can, the VA's policies on productivity and quality—that's very important to me. Let's determine, as best we can, how the VA rewards its employees for performance. Let's determine, as best we can, if harassment did take place. Let's determine, as best we can, if a promotion was unfairly denied. And let's determine, as best we can, if a reprimand actually took place.

Mr. Chairman, these are the issues that gave rise to this hearing. These are the issues that gave rise to the press stories that we have all seen. I would hope that we would stick to them as this hearing progresses.

Mr. Chairman, there may be witnesses here this morning—and there may be some individuals in the audience—who believe our hearing will also focus on other matters, such as the $10 fee limitation for attorneys who represent veterans, or the very involved question of judicial review of veterans' claims. Neither of these issues are now before this committee, and I repeat that.

Mr. Chairman, I have one final comment. I think it to be no coincidence that a full-page advertisement has been purchased to appear this week in The Washington Post, which was, in fact, in the paper this morning. It mentions your name in a very derogatory way, Mr. Chairman. I am told that a full-page ad in The Post usually costs about $32,200. I am also told, however, that this ad only cost about $14,000, and was paid for by some anonymous donor. Now, it is an ad which, by its own words, is obviously sponsored and endorsed by the organization called the "National Association of Radiation Survivors."

Mr. Chairman, I have read this ad. It generally condemns the Government of the United States. It says that there has been destruction of evidence and strongly implies that this has been by the hand of Government officials. It says that compensation stipends available to veterans are "meager". Boy, there's nothing that burns me up more than having read that in that paper. This is compensation, Mr. Chairman, for disabled service-connected veterans. This charge involves an issue annually addressed as a priority matter by the House and Senate Veterans' Committees and, in fact, by the entire Congress.

No other organization—not the American Legion, not the Veterans of Foreign Wars, not the Disabled American Veterans, not the AMVETS, not the Military Order of the Purple Heart, not the Paralyzed Veterans of American, not the Blinded Veterans Association—not any other organization has ever made such an outlandish charge.

Mr. Chairman, this advertisement singles you out as an arch villain. You are described as follows—and I quote: "For almost a decade, Montgomery has managed to kill every single bill introduced in his committee to restore the basic rights of citizenship to our disabled veterans", of which I am one, Mr. Chairman.

Let me me tell whoever wrote that crap—and I say crap—let me tell them, if you want to blame Sonny Montgomery, wherever you are out there, then you had better also blame me, too. And you had better blame gentlemen sitting on each side of me, every member of this committee, on both sides of the aisle, in the Senate and in the House, because any one of us sitting on this committee or on the floor of Congress could have offered amendments on the issues before us to any legislation and could have dealt with this or any other subject if they thought they had merit. And in fact, we have dealt with this subject on and off.

So I think somebody ought to be severely reprimanded for doing such a thing to a man like Sonny Montgomery, who has been one of the outstanding Members of this Congress for so many years and has done so much to better the lives of veterans and their families. I am just terribly upset with such a thing, Mr. Chairman, and I hope that we will stick to the issues before us today, and I'm going to try to get to whoever put that ad in that paper and tell them a thing or two.

[Applause.]

[The prepared statement Congressman Solomon appears at p. 94.]

The CHAIRMAN. I want to thank my colleague, Jerry Solomon, from New York, certainly in defense of what we have tried to do in this committee for veterans. Thank goodness, Jerry, not too many people in Mississippi take The Washington Post.

[Laughter.]

If they are going to use my name, I hope they put it in larger print.

The Chair would like to recognize the ranking minority member of the Senate Veterans' Affairs Committee, Senator Frank Murkowski of Alaska. Senator, thank you for being here this morning.

OPENING STATEMENT OF HON. FRANK MURKOWSKI

Senator MURKOWSKI. Thank you very much, Mr. Chairman. It is a pleasure to be here.

I want to comment very briefly on Representative Jerry Solomon's statement. I, too, saw the article and responded, although not as eloquently, as you have. Obviously little is gained when we see this sensational type expose generated to raise, if you will, emotions to a level that doesn't necessarily involve rationale people being able to sit down and direct the facts concerning the situation. Jerry, I certainly echo your sentiments and your bottom line, that this type of thing obviously gets us no where.

As a consequence, Mr. Chairman, I believe that our hearing should focus on one issue. That is the issue that we're all concerned about—can veterans and the Congress retain their confidence in the VA claims adjudication process? As part of our oversight responsibility over the Veterans' Administration, we, in Congress, must ensure that veterans rightly receive the benefits to which they are entitled.

I am concerned that our ability to accomplish that goal may be impaired by unsupported and sometimes anonymous allegations about the Veterans' Administration, the work of veterans' service officers, and Members of Congress, as has already been mentioned by Jerry Solomon.

I, too, was disappointed to read the assertions in an ad in today's *Washington Post* from an anonymous source, that the chairman of the House Committee on Veterans' Affairs has acted against the interest of veterans and their rights. Anyone wanting to create a record of advocacy and action for veterans could do no better than to copy the record of Sonny Montgomery. Chairman Montgomery and his record have been visible for all of you and all the rest of the world to see.

I find it interesting that the ad presents only negative aspects and failed, in any manner or form, to present a balanced viewpoint on what the VA and the Congress have done for Atomic Veterans, including the many pieces of legislation, one of which I recently introduced, which is strongly supported by the National Association of Atomic Veterans and the Disabled American Veterans—to address the plight of Atomic Veterans. One witness today states in his prepared testimony that compensation claims are "inevitably denied for failure of proof". The 2.2 million veterans receiving almost $10 billion in tax-free compensation cast some doubt on this particular assertion.

I am also concerned by selective quotations generally circulating from the court record concerning the discovery process in the *NARS* v. *Turnage* lawsuit. I cannot, and will not, defend, condone or associate myself, nor will my colleagues, with the destruction or withholding of evidence or the harassment or intimidation of any VA employee who has presented evidence related to this litigation—if it is found to occur. Those are issues which should be and which will be, resolved by the courts and not the Congress.

However, I do not believe veterans are well served by quotations which imply that the Veterans' Administration and dedicated employees of that agency acted maliciously when, in fact, the judge, to date, has not found any malicious intent. I am terribly disappointed that a witness before our committee today would describe VA employees as capricious, petty bureaucrats deserving nothing more than our disdain. This name calling serves no useful purpose.

I have reviewed some of the material which has come to light as a result of the lawsuit's discovery process. I have seen the Inspector General's report dated July 15, 1982, which shows an error rate higher than that reported by the VA's Department of Veteran's Benefits internal quality control system. We are led to believe that this is a clear indication of a pattern of conduct on the part of the VA to deny veterans' claims. What we are not told, however—and this is rather interesting—is that the Inspector General found that the errors are much more likely to favor veteran claimants and not the Government. According to the Inspector General, of all erroneous payments, 93.4 percent, or $171 million, are in overpayments to veterans.

I am disappointed that some individuals have chosen to attack the outstanding record of veteran service officers who represent veteran claimants at no charge. In Alaska, we are fortunate to have people with the veterans' service organizations who are very dedicated and knowledgeable.

Let me read from a recent report filed by the Department of Veterans' Affairs for the State of Oregon regarding a State-run pilot program to overcome the $10 fee limitation by using State funds to provide attorneys to veterans in the preparation, presentation and prosecution of claims under the laws administered by the Veterans' Administration. The report states that the attorneys charged $11,281 with no tangible results for veterans due to the attorneys' assistance. One attorney reported that in the cases referred to him, half of which were Agent Orange and radiation cases, the prior work by existing veteran service officers had been "thorough and had left no stone unturned." He had, "no option but to go back over the same ground."

According to the attorney, "all cases that I have been assigned have been fully developed. Service officers deserve credit for exhaustive and thorough work, and I should add that not one veteran expressed any dissatisfaction whatsoever for work done on their claims by Oregon county veterans' service officers or accredited representatives. In fact, just about all the veterans expressed praise and gratitude for the service officers, even though their particular claims may have been denied".

In conclusion, Mr. Chairman, I don't want to minimize the gravity I place on the issues raised by the information which has led to this hearing. Neither the VA, nor the veterans, should interpret my concern or my colleagues' concern as acceptance of the status quo or rejection of the relevance or importance of the issues raised here. As I said, I will not defend, condone or associate myself with the destruction or withholding of evidence, or intimidation or harassment of witnesses, if it is found to occur. Nor will I shrink from taking whatever measures are necessary to ensure that the VA, in both policy and practice, evaluates veterans' claims fairly and accurately. That is my bottom line, and I think my colleagues would agree that that is our agenda. I intend to work constructively to protect the interest of veterans whom our committees and the VA are charged with serving.

Mr. Chairman, I am going to be here for a while but I am going to have to go to another meeting. My counsel, Tony Principi, will be here throughout the entire hearing. I thank you for holding this hearing, Mr. Chairman, and wish you a good day.

[The prepared statement of Senator Murkowski appears at p. 100.]

The CHAIRMAN. Thank you, Frank. I also want to especially thank you for your comments. You and I had the privilege of working for 2 years together, you as chairman of the Senate Veterans' Affairs Committee, and I as chairman of the House committee. I appreciate what you have said.

I would like to point out that apparently some of the persons who have been critical of us in this article haven't really followed our agenda over the years, where several years ago Congressman Hammerschmidt, in what is known as the Hammerschmidt amendment, and Dr. Rowland and myself, sponsored an amendment, which was adopted in the House, for the Atomic Veterans. I am sure the Atomic Veterans Association did not support the National Association of Radiation Survivors in what they're saying.

But we covered three phases—leukemia, rare blood disorder, and typhoid cancer. It was passed in the House. Unfortunately, it did drop out in the Senate. Also, as to the criticism of Senator Warner, in this House we did pass legislation that made some corrections to what the Warner amendment did. So, quite frankly, I can't follow the criticism that comes from this article.

The Chair would like to recognize Mr. Don Edwards at this time, and then we will recognize Senator Mitchell, speaking on the Democratic side. But Don Edwards of California, the ranking majority member, a very fine person and a wonderful member of this committee.

Senator **Murkowski**. Mr. Chairman, and Congressman Edwards, if you would excuse me, might I also mention that in the Senate we have introduced legislation with regard to blood cancer and other diseases associated with exposure to ionizing radiation.

I also ask your permission, Mr. Chairman, during my absence, if my chief counsel, Tony Principi, could present some questions as you deem appropriate.

The **Chairman**. We will certainly work something out on that. Anything you would like put into the record will be so ordered, without objection.

Senator **Murkowski**. Thank you, Mr. Chairman.

The **Chairman**. Don Edwards.

OPENING STATEMENT OF HON. DON EDWARDS

Mr. **Edwards**. Thank you, Mr. Chairman.

We appreciate having these hearings today. It is really a very important day and certainly, Mr. Chairman, on this committee, we are unanimous in our affection and admiration for our chairman. There has never been any question about that.

You know, sometimes in politics the first amendment of the Constitution results in some freedom of the press and some statements that we might not be too happy with, but we are grown men and women in Congress and this is a part of what we're getting paid for.

Mr. Chairman, the Justice Department and some others suggest that this committee should not be holding this hearing because there is a case involving due process and the VA presently before the courts. I might point out, Mr. Chairman, if Congress were to follow that line of reasoning and refuse to oversight Government agencies while cases were pending against them in court, we could all pack our bags and catch the next flight home.

We cannot turn our backs on the fact that the VA has conducted itself in such a fashion that a court of law was led to hold the agency in reckless disregard of legal process and to fine the Veterans' Administration over $115,000. That is a fact that we're stuck with and that's the reason that we're here. We cannot ignore the information which recently has been brought to public light about the manner in which the VA is handling, or mishandling, a substantial number of veterans' cases.

Further, it is certainly not acceptable for long-time, faithful VA employees to be harassed at work for doing their jobs for the agency and for veterans, for trying to comply with the law, and for telling the truth in a court of law. We have evidence to that effect, Mr. Chairman, and that should be laid out on the table, too.

Ensuring due process in the adjudication of claims is a major function of the VA. No matter how many court cases the VA finds itself in, the work of this committee on this issue cannot stop. We have a solemn duty to search for the truth, to learn the facts, and to bring the will of Congress to bear on ensuring the Veterans' Administration's compliance with the laws that we pass.

Thank you, Mr. Chairman.

The **Chairman**. Thank you, Don Edwards. I think we will all gain from this hearing today.

I want to apologize to some of our guests here. We don't have enough seats, but I appreciate the interest you are showing in the veterans programs.

The Chair would like to recognize the Senator from Maine, Senator Mitchell. Senator, it is nice to have you over here.

OPENING STATEMENT OF HON. GEORGE J. MITCHELL

Senator MITCHELL. Thank you, Mr. Chairman. I commend you for holding this hearing. I concur wholly in the views expressed by Representative Edwards regarding the appropriateness of this hearing.

As a former Federal judge, I believe that the allegations regarding the VA's performance in the pending lawsuit are of a most grevious nature, a most serious nature, and the implications extend far beyond this specific lawsuit. They really go to the heart of what we believe our society is and ought to be, and whether the Government itself is bound by the rule of law, as we expect all individual citizens to be bound. So I think this is a very important hearing, Mr. Chairman.

The statement made by the Federal judge just on January 8—and I quote—that "the VA has shown a deliberate recalcitrance in providing discovery and has taken other actions which demonstrate its callous disregard for the lawful processes of the court," is a very servious charge. I recall before I became a Federal judge that I was a United States Attorney and we were constantly reminded that, as United States Attorneys, our client was not an ordinary litigant but the Government of the United States. That impressed upon us the need to maintain not just a high standard of integrity but the very highest standard of integrity. The sovereign Government has an obligation that extends beyond that of ordinary citizens to uphold, enforce and live by the rule of law.

So these committees, Mr. Chairman, under your leadership, must make certain that the facts are discovered, exposed, and utilized and take corrective action to see that this cannot ever happen again. The real test of any human society is not its infallability, because none is; rather, it is its willingness to acknowledge error, when made, and to take action to correct it. We have to do that here, Mr. Chairman, so I commend you for this hearing.

I would just say on the subject of the advertisement, Mr. Chairman, we don't agree on that issue. But I think that everyone who has any familiarity with veterans issues in this country knows of your great leadership, the extent to which you have made it possible for millions of veterans to receive fair and appropriate treatment. I hope very much that this debate can be conducted within the bounds of decency and civility and respect for someone whose record is such as yours is.

So, speaking at least for myself, and I know for the other Democrats on the Senate side, we look forward to working with you, Mr. Chairman, on this matter.

The CHAIRMAN. Thank you very much, Senator Mitchell. It was an excellent statement and I appreciate your kind remarks toward me.

Lane Evans of Illinois.

OPENING STATEMENT OF HON. LANE EVANS

Mr. EVANS. Thank you, Mr. Chairman.

I would like to start out by saying that we in Congress have a pretty good relationship with the Veterans' Administration. Many of us, myself included, have benefitted from the GI bill or other programs, and when we contact the VA for a constituent, we get a helpful response.

But the question that has been raised by the *NARS* litigation, however, is how the Veterans' Administration treats its more typical customers. And as I think will be clear from today's testimony, the question is not just how veterans are being treated in San Francisco, but how they are being treated in every regional office in this country. So I urge my fellow Members to consider all of the testimony, especially the testimony of Gordon Erspamer, the attorney for NARS, as a person who has spent the most time going through the documents released by the VA, and who is extremely well-informed on how veterans are being treated. He will only have about 5 minutes to give a summary of his testimony and I would urge my colleagues to read through it in its entirety.

Now, there are three other witnesses I would like to call particular attention to. These are Mr. Ronald Abrams, Mr. Barry Boskovich, and Mr. Thomas Kenny. These men testified in San Francisco and have since that time been the object of shameful harassment by VA personnel. Their pleas for protection from the agency have been met with lukewarm reassurances and cold warnings to behave "responsibly" when testifying to Congress. So I commend Mr. Abrams, Mr. Boskovich, and Mr. Kenny for their courage in honoring these committees' invitations, and I can assure them that I personally am taking a strong interest in their well-being at the Veterans' Administration.

Lastly, I would like to see some indignation, expressed on some other issues here today, extended toward the VA, regarding the issue of who is not here to talk to us today. Mr. Gary Hickman of the VA has declined our invitation. Mr. Hickman was in charge of responding to discovery for the Compenpation and Pension Service and his failure to testify here today will hurt these hearings. Miss Wheeler, who assisted Mr. Hickman, has also decided not to appear. This sort of lack of cooperation from VA employees, especially ones who have already been chastized by a Federal court judge, is not the way for the VA to clear the air on these issues.

I, for one, am very frustrated by this turn of events, and I think it highlights the fact that what has come out in NARS is not going to be resolved just today at these hearings. There is no question in my mind that, to completely understand what happened in the VA Central Office in Washington, D.C., we need to hear from the principals and, to understand the full impact and import of the information ultimately released, we will probably need to revisit this issue sooner or later, either as a full committee or through a subcommittee.

I appreciate the chairman yielding.

The CHAIRMAN. Thank you, Chairman Lane Evans.

The Chair recognizes the gentleman from New Jersey.

OPENING STATEMENT OF HON. JAMES J. FLORIO

Mr. **Florio**. Mr. Chairman, in the interest of conserving the committee's time, I have an opening statement that I would like to put in the record in its entirety and just make three very brief observations.

One is that I think this committee hearing provides us with an opportunity to review that question that was raised, as to whether there is any relationship between the absence of judicial review and the specifics that we're going to be hearing about today. I would philosophically suggest that the very fact of the absence of judicial review is conducive to potential abuse at a lower administrative level because there is an awareness of the fact that there will be no review. So I think that is something that is an appropriate topic to extrapolate from these hearings.

Over and above that, I have concern not with regard to the specifics of this particular piece of litigation but also to the prevalence of the practices that seem to be prevalent here as it impacts upon other groups—the Agent Orange veterans are a group that comes to mind immediately—but most importantly, the unorganized veterans, whether they are receiving the same type of treatment that has clearly been provided to the veterans that are here in question.

Then lastly, I am concerned that the administrative process across the board may very well have been abused over the last number of years. I can recall, Mr. Chairman, hearings that we had last year with regard to the Emergency Veterans Job Training Act, when we saw and found out—Congressman Daschle, now Senator Daschle, was the lead person in this instance—we found out that regulations were being drawn not to implement the policies but in some respects to thwart the policies that the Congress had passed. That is to say, the regulatory process was being abused so as to make people ineligible for what it is that the Congress had provided in terms of the statute that was passed.

Now, that is not just something we see in the VA. It is something we have been seeing in the last couple of years across the entire governmental system. I am sure that the chairman and the members remember the difficulties we had with regard to Social Security and the Social Security disability situation, that we had clear evidence—and this Congress reacted to make corrections—we had clear evidence that people were being disqualified from disability ranks, from the disability rolls, as a budget-saving mechanism. The expectation was that if someone was thrown off of disability, they would not be able to qualify because many people would not go through the administrative review process; therefore, we were saving money in some respects.

Mr. Chairman, I guess I'm most concerned about budget-driven policies that are impacting and perverting the administrative process at all levels of Government, and the absence of review in the specific situation here in the VA is almost a situation that cries out for correction in light of the existing system that we have, whereby people are consciously being told that the administrative process is not working and there is no capability of reviewing it.

So, Mr. Chairman, I commend you for having these hearings, so that we will be able to look at the specifics in this situation to see if they are part of a pattern throughout the VA process and, more significantly, to see if it is not a part of a pattern throughout the entire governmental process. I think these committee hearings serve a very vital public interest purpose.

Thank you, sir.

[The prepared statement of Congressman Florio appears at p. 104.]

The **Chairman**. I thank the gentleman for his statement.

Before recognizing Senator Cranston we have John Bryant of Texas. Then I want to recognize the Chairman of the Senate Veterans' Affairs Committee. You go ahead.

OPENING STATEMENT OF HON. JOHN BRYANT

Mr. **Bryant**. Thank you, Mr. Chairman.

I simply want to state that I'm encouraged to hear the affirmation from Lane Evans, the chairman of the Oversight Subcommittee of this committee, that he intends to keep an eye on the situation regarding Ronald Abrams, Barry Boskovich, and Tom Kenny, inasmuch as they have been willing to come forward and testify before this committee, apparently to their own disadvantage already, and I hope not to their disadvantage in the future. I simply want to affirm that I intend to follow the lead of Chairman Evans in doing whatever is within my power to prevent and to follow-up on any attempt by any bureaucrat at the Veterans' Administration to punish these individuals for coming forward.

Second, I would like to make clear the umbrage that I take at the very notion that any employee of the Veterans' Administration refused to come forward to this committee to testify. I am a little bit concerned that I don't hear the same speeches of outrage about that that I've heard this morning about this advertisement run by some private group. Albeit we all disagree with the contents of it, it is rather unimportant when you compare it to the severity of high officials within the Veterans' Administration refusing to come forward and testify to this committee. I sincerely hope that the chairman will not let this matter pass without making it clear to these individuals and to the entire Veterans' Administration that we won't be satisfied, in whatever desire we may express, to hear testimony from any employee at the Veterans' Administration, and if it means a subpoena, we ought to vote a subpoena today.

I thank the gentleman.

The **Chairman**. I really don't have any problems. I agree with you. I think these witnesses ought to come up here from the Veterans' Administration. Let's see what we come up with today, and then we'll take a look at it. But I have no problems with it.

Let me recognize the Senator first, and then you, Roy, and anybody on the Republican side will be recognized. But we do have these witnesses and, as soon as possible, it would be good to move ahead.

The Chair is very pleased that Alan Cranston is here. You keep coming over here, and we like to have you over here on the House side. This is a joint hearing and you're the co-chairman. The Chair would like to recognize the gentleman from California, Alan Cranston.

Senator **Cranston**. I would be glad to yield to Dr. Rowland first, if you wish.

The **Chairman**. It might be your last time. You had better—— [Laughter.]

Dr. **Rowland of Georgia**. Go right ahead.

OPENING STATEMENT OF CHAIRMAN CRANSTON

Senator **Cranston**. Thank you very much.

I am pleased to be at today's joint House and Senate Veterans' Affairs hearing to investigate serious questions which have arisen out of the *NARS* v. *Turnage* litigation. These questions concern the VA's apparently rather cavalier attitude towards its obligations as a party to an action in a court of law, an attitude suggesting that some in the VA may have considered the agency to be above the law, to the point where a U.S. district court has found that some VA employees made misleading statements under oath and the destruction of documents was countenanced, even though it was foreseeable that the VA might well be required by law to produce them for the plaintiffs. Even more significant, however, are allegations arising out of this litigation that suggest significant flaws in the VA's claims adjudication process and quality control procedures.

In investigating these issues, we are carrying out one of the most important functions of the Veterans' Affairs Committees: Oversight of the VA system in order to ensure that it does, indeed, meet its statutory responsibilities to our veterans and their dependents. I am sure we all share the goal of ensuring that these men and women receive the services and benefits due them in accordance with the laws enacted by the Congress.

I am greatly concerned about the VA's attitude towards its legal obligations as a defendant in a lawsuit, an attitude which, in this case, resulted in the court fining the agency $115,000. The testimony before the court revealed that the VA failed to meet the obligations required of every litigant, which certainly cannot be less for an agency of the United States Government. Regardless of whether the VA's failure to produce required documents, or to ensure that relevant documents were not destroyed, or to respond truthfully and not misleadingly, were the result of willfulness or gross negligence, I find totally unacceptable the abandonment of proper supervisory responsibility by management-level VA employees. Management officials not only failed to exercise adequate supervision over subordinate employees, but they also appear to have acted in such a way as to permit VA employees assigned to determine and locate documents in response to discovery to become isolated from those VA employees who actually were knowledgeable about the kinds of documents which the plaintiffs had requested.

These actions, or inactions, clearly give rise to inferences that the fostering of ignorance within the agency might have been used as a means of evading the VA's legal obligations to turn over relevant documents in the discovery process. Moreover, even after certain specific discovery requests were made and communicated within the agency, the further destruction of relevant documents was contemplated, and would have been carried out but for the intervention of some fortuitous events.

Surely, the Government owes to its citizens a greater sense of dedication to the faithful execution of the laws—all of the laws—of the United States.

As I noted a moment ago, however, even more serious than the discovery abuses are the questions which have been raised about the integrity of the VA claims adjudication process itself. VA documents produced in the course of the *NARS* case reveal an emphasis on productivity over quality, and an incentive system that appears to reward speed in handling claims even in the face of possible fundamental unfairness to veterans.

There is evidence that the present claims adjudication process may encourage the use of certain techniques to speed claims processing, which has resulted in veterans being denied their right to a hearing, having their claims improperly disallowed because they have not produced unnecessary and even unavailable documentary evidence, and being wrongly notified that they have less time to complete an application for benefits than they actually do. If such methods of processing applications for benefits do exist, they clearly result in the denial of fair process to veterans which may, in turn, cause the denial of benefits to which those veterans may be entitled.

Although these problems may be more severe in some VA regional offices than in others, serious questions have been raised regarding both the denial of fairness and attempts to cover it up, or at least to do nothing about it. It is our obligation to see that these questions are answered definitely and swiftly.

I intend to take two steps to ensure that violations of legal process, as well as fair process, find no home within the VA. First, I am asking the Comptroller General of the United States to conduct a complete investigation of both the discovery and due process issues which have been raised in the *NARS* litigation and this hearing. I will ask the GAO to devote maximum resources to this investigation and to attach maximum urgency to it.

Second, the due process questions raised in this case point up the clear need for remedial legislation to ensure that the VA fulfills its mission of providing fairness and the benefit of reasonable doubt to our veterans. Such legislation would specify in law various regulations which it appears the VA does not follow and does not intend to follow, and should change the current emhasis on productivity to one which also provides an incentive for quality. I intend to see such legislation passed by this Congress.

Before I close, I want to note my commitment to bringing about during this session a resolution of the very basic issues that surround this hearing and the *NARS* litigation. First, the preclusion of judicial review; second, the anachronistic $10 attorney fee limitation; and third, the provision of fair compensation for veterans and their survivors based on exposure to ionizing radiation from nuclear explosions. We must not lose sight of these very fundamental matters, and I will not.

Finally, I especially thank those individuals who, in response to our invitation, have come here from the VA to testify today as private citizens. I would like to make clear, as the chairman of the Senate Committee on Veterans' Affairs, that reprisals in any form against these VA employees because of their willingness to respond to the Congress' invitation to testify in this hearing, or their truthful testimony in court, absolutely will not be tolerated.

Finally, I want to say a word about my good friend, Sonny Montgomery, and about The Washington Post ad that Jerry Solomon spoke about earlier. Sonny and I don't always agree on all issues, although we do on most issues, but I know his motives are always of the very highest. The scurrilous and sad allegations about Sonny in that ad are most unfortunate and most unfair. Sonny Montgomery is a champion of veterans. Sonny Montgomery deserves praise for his unfailing efforts to promote and protect veterans' benefits and veterans' services. The kind of name-calling and finger-pointing represented by that ad is counterproductive and sorely ill-advised and, most importantly, does a gross disservice to a great American and a great friend of America's veterans, Sonny Montgomery.

[The prepared statement of Chairman Cranston appears at p. 105.]

The CHAIRMAN. Thank you very much for that very strong statement, Mr. Chairman. I appreciate you bringing out about the article. The article really doesn't give me that much concern, in that I know I'm doing the best that I can for the veteran, and that's about all a human being can ask for and come forth with.

Also in your statement about harassment of VA witnesses, I thoroughly agree with you. We have got to get to the facts and the VA can't take punitive actions against anybody that wants to speak up. That's what these hearings are all about and I agree with that part of your statement you made, Mr. Chairman.

Are there any other comments? We certainly would like to get on with the witnesses, if we could.

Dr. Rowland.

OPENING STATEMENT OF HON. J. ROY ROWLAND

Dr. ROWLAND OF GEORGIA. Just one minute. I want to address specifically what this committee has done and is attempting to do for Atomic Veterans under your able leadership, Mr. Chairman.

You mentioned the piece of legislation that we had a couple of years ago that created a panel to find out more about the Atomic Veterans and the problems they were having, and three diseases—cancer of the thyroid, polycythemia vera, leukemia and chronic lymphatic leukemia—was placed in that legislation. We are now working on legislation to try to identify those diseases based on the presumptive evidence that they may have been caused by ionizing radiation.

That's not easy to do. That is difficult to do, because if we come forward with some legislation to address that, we need to be as sure as we can that we're going to have a good case and be able to get those diseases in the legislation, such as diseases of the gastrointestinal tract and cancer of the thyroid. There are some diseases included, like cancer of the bone, which is caused by radium. Radium is not a by-product of atomic explosions. So we have got to be sure, when we bring this legislation forward, that we are really going to do the best job that we can for Atomic Veterans.

We have been working on that, we continue to work on that, and this committee is doing the very best it can, along with the Senate committee, to try to address the problem that those Atomic Veterans have. I just wanted to point that out.

The **Chairman**. That is an excellent statement. I want to thank Dr. Rowland for updating us. We have been working in this area for several years now. We will continue to do so, as you said.

If there are no other comments, we will recognize our first witness this morning, Gordon P. Erspamer, who is attorney for the National Association of Radiation Survivors. I would like to welcome you to this committee. Your full statement will be put in the record. If you would like to introduce the other person there at the table with you, the Chair would be glad for you to do that.

STATEMENT OF GORDON P. ERSPAMER, ESQ., ATTORNEY FOR THE NATIONAL ASSOCIATION OF RADIATION SURVIVORS; ACCOMPANIED BY MRS. KAY HINKLE

Mr. **Erspamer**. Thank you, Chairman Montgomery.

The **Chairman**. If you have no objection, we would like you to limit your statement to 10 minutes so that Members can ask questions and make comments.

Mr. **Erspamer**. That is fine. I think my remarks will be completed within that time frame.

On behalf of the National Association of Radiation Survivors and all disabled veterans and their survivors, I would like to express my appreciation to Congressman Don Edwards and the members of the House and Senate Veterans' Affairs Committees for inviting me to appear here today. I am joined here today, on my right, by Kay Hinkle, a member of NARS, a plaintiff in the *NARS* v. *Turnage* lawsuit, whose late husband, Pat Hinkle, was felled by cancer in the prime of life.

[Mr. Erspamer subsequently submitted the following information for the record:]

> Although I am an attorney for NARS, the views I express here today, including my prepared testimony, are personal and do not necessarily reflect those of the NARS organization.

Mr. **Erspamer**. The *NARS* v. *Turnage* action which has led indirectly to this hearing is not a difficult action to describe. It is simply a due process action by a group of disabled atomic veterans and widows, seeking not to obtain money, but only the ability to retain attorneys at their own expense, unhampered by the 125-year old $10 attorney fee limitation.

As reflected in my prepared remarks, the impetus for this hearing was a series of judicial findings of misconduct by the VA, including the destruction of relevant evidence, suppression of other critical evidence, and a series of factual misrepresentations and distortions made by the VA in papers filed with the court.

The focus of my prepared remarks was to describe the true condition of the Veterans' Administration based upon the VA's own studies produced in the *NARS* case. Unfortunately, the picture of the VA that emerges departs dramatically from the portrayals offered by VA officials to Congress and, I predict, the testimony you will receive from several of them today. However, the VA cannot deny the findings of its own studies, which show that the VA is abusing its power at the expense of veterans. These problems are not limited to the State of California or one type of claim. Rather, they are nationwide in scope and infect the processing of all VA claims.

The VA's own documents and studies are the key to understanding why reforms are necessary of the antiquated adjudication model represented by the Veterans' Administration. The VA's internal problems are traceable in their origin to the combined effect of the absence of judicial review and the existence of the $10 maximum fee limitation. That is how these issues are implicated today. Until these antiquated restrictions are eliminated, I believe there is no reasonable prospect of avoiding the continuation of the abuses of veterans' rights.

The theme of my remarks can best be summed up by referring to a statement appearing in a book by the Lord Chief Justice of England, entitled "The New Despotism", quoted in a 1933 review of the ABA Journal: "To employ the terms administrative 'law' and administrative 'justice' to such a system or negation of system is really grotesque. The exercise of arbitrary power is neither law nor justice, administrative or at all. The very conception of law is a conception of something involving the application of known rules and principles and a regular course of procedure. There are no rules or principles which can be said to be rules or principles of this astonishing variety of administrative law, nor is there any regular course of procedure for its application."

For several decades Congress has been deluded into believing that the VA adjudication process was running smoothly, efficiently, and fairly toward those who have made the ultimate sacrifice for our country. It is now apparent that the true picture is to the contrary, and that the appearance of regularity was a reflection not of the fairness of the adjudication system but of the effects of the erosion of veterans' constitutional rights, including the right to counsel of their choice, and to their day in court. In short, in the process of attempting to reward our veterans for their sacrifices, we have unintentionally stripped them of their dignity. In the process, the VA, and many of the service organizations which were founded to serve veterans, have lost sight of their mission to serve veterans.

The series of processes by which these indignities were wrought is complicated and beyond the scope of a few minutes of remarks. Simply stated, however, the VA has substituted production goals, adjudication speed, and administrative convenience as its goals of choice. As a result, a series of abuses of veterans' rights have surfaced, and no remedies exist to check them.

These characteristics of the VA adjudication system are reflected in its handling of atomic veteran claims. The VA's response to the atomic age is particularly indefensible. Only 17 of approximately 5,000 atomic veteran claims for cancer and leukemia have ever been granted. Despite the passage of new regulations in 1985, supposedly liberalizing the criteria for service-connection for ionizing radiation exposure, only a single atomic veteran claim—that of Marthann Conner, previously named as one of the plaintiffs in the *NARS* action—has ever been granted in the past 2 years.

The VA's adjudication of ionizing radiation claims has been plagued by a pronounced hostility toward these claims, a lack of standards, an unwillingness to grapple with the complex scientific and medical issues involved, and a blind and almost reverent allegiance to the inaccurate and biased radiation dose estimates provided by the Defense Nuclear Agency, which is not exactly a disinterested party.

It was these indignities, compounded by the restrictions on veterans' civil rights, that spawned the *NARS* case in 1983. While NARS is and has been overwhelmed by the imbalance of resources between it and the VA, the *NARS* case stands as a symbol that injustice will not tread indelibly on the backs of those, the human guinea pigs, who courageously and steadfastly served this country in its time of need.

At this point I would welcome the opportunity to respond to any questions of the panel, and Kay Hinkle is here to respond to any questions on behalf of NARS or as a plaintiff in the *NARS* action.

[The prepared statement of Mr. Erspamer appears at p. 109.]

The **Chairman**. Thank you for staying within the limits of the time. Thank you very much. The committee appreciates that.

I'm going to make some comments and ask a couple of questions on this article, and then I have one question for the record. I hope I can stay within my 5 minutes time.

This ad has the name of the association you represent. Did you approve of this advertisement being run in The Washington Post?

Mr. **Erspamer**. Well, I am not an officer or director of the NARS. I am here today in my capacity as an attorney for the National Association of Radiation Survivors. I can certainly assure the chairman that I knew the ad was going to be run, and that I had reviewed it prior to the time it was run.

The **Chairman**. Then you didn't——

Mr. **Erspamer**. I didn't understand that these hearings were about the ad, but——

The **Chairman**. Then you didn't object to the ad?

Mr. **Erspamer**. I did not object to the ad. In fact, I believe that the statements contained in the ad are true.

The **Chairman**. Well, okay. In other words——

Mr. **Solomon**. Will the chairman yield?

The **Chairman**. In other words, I have never supported veterans' programs is what you're saying? Is that what you're saying?

Mr. **Erspamer**. Pardon me?

The **Chairman**. That I have never supported any veterans' programs.

Mr. **Erspamer**. I don't believe the ad states that. The ad, I believe, states that in terms of the veterans' civil rights issues described earlier in the same paragraph, remedial legislation, such as judicial review, elimination of the fee limitation and so on, that you have opposed that legislation. I believe that's a correct statement, subject to correction by you.

The **Chairman**. It is not true. The civil rights of veterans, in my opinion, that would cover all walks of life for the veteran.

How much did you pay for this ad?

Mr. **Erspamer**. I didn't pay anything for it. I didn't make the arrangements for payment of the ad. The arrangements were made directly by the National Association of Radiation Survivors.

The **Chairman**. Maybe the other witness could tell us how much the ad cost and who bought the ad.

Mr. **Erspamer**. The ad was purchased by an anonymous donor who was a Crossroads veteran who paid for the ad directly. I believe the ad, because it was not run on a date certain—it was run on a floating basis—was approximately $15,000.

The **Chairman**. For the ad?

Mr. **Erspamer**. Yes.

The **Chairman**. Who was the donor? He just comes in, and anybody that comes in with the money can run an ad, as far as the association you represent?

Mr. **Erspamer**. I believe that the anonymous donor, who has asked to remain anonymous—and I'm certainly not going to reveal his identity—is a member of the National Association of Radiation Survivors. He is a veteran from Operation Crossroads, tests Able and Baker, run in the Pacific in 1946.

The **Chairman**. But it was a member of the association and the money did come from an individual that belongs to this association?

Mr. **Erspamer**. That's correct.

The **Chairman**. But you will not give us his name?

Mr. **Erspamer**. Without permission, without his permission, I think it would be a breach of faith to do that.

The **Chairman**. Well, I think the committee—I don't know whether we have the subpoena power or not—but if we could look in at The Washington Post and see who paid for the article, I think it would be important to some of us.

My question is that in 1983 and 1984 you were very critical of the VA's Inspector General while that office was investigating charges that one of the plaintiffs you represent in this case had defrauded the VA by charging for services which it did not provide. Your client later pleaded guilty to the Inspector General's charge in U.S. District Court.

Recently you described an Inspector General's investigation into allegations that VA employees had purposely destroyed documents that were responsive to your discovery request as amateurish. The conclusion reached by the Inspector General was that the document destruction was nothing more than a routine housecleaning.

Yet your testimony refers in favorable terms to a 1982 Inspector General audit of the VA errors in deciding compensation and pension claims, which the Chief Benefits Director strongly disagreed with.

My question is, should we rely on the IG's findings in this audit and disregard those earlier efforts? It seems that in the past you have praised the IG and now you're very critical of him.

Mr. **Erspamer**. First of all, I have to disagree with your description, including the premises behind your statement and your description of the events that occurred in 1983 and 1984, and also differ with your characterization of my statements about the IG investigation of this particular matter.

I did not come here today prepared to discuss the complex facts arising out of the 1983 to 1984 investigation of the Swords to Plowshares Veterans' Rights Organization, but I'm happy to go into that if you would like.

In 1983, the Swords to Plowshares Veterans' Rights Organization was one of the plaintiffs in the *NARS* action. Shortly after the action was commenced, I believe a six-person audit team from the VA Inspector General's office descended on the San Francisco office of Swords to Plowshares and spent approximately 6 weeks of time auditing an approximately $20,000 VA services contract. They interviewed virtually every single client ever served by the Swords to Plowshares Veterans' Rights Organization. They also suspended all payments to Swords to Plowshares at that time, and virtually drove the organization out of business. Swords to Plowshares was forced to lay off its staff, and was soon in extremely dire financial circumstances.

Based upon these events, plaintiffs filed an amended complaint in the Federal District Court alleging retaliation by the VA for the exercise of Sword's rights to bring a lawsuit. The judge nearly entered a TRO. We had various discovery planned in connection with a preliminary injuction motion at that time. The matter was settled through an intermediary—it did not involve our firm—and Swords, nearly bankrupt, ultimately was the subject of a criminal investigation.

As I understand it, the VA Inspector General concluded that it was questionable whether or not certain of the services Swords to Plowshares had claimed were advocacy services or counseling services that properly fell within the realm of the particular program under which Swords to Plowshares was providing services. Ultimately, the Swords to Plowshares Veterans' Right Organization, the organization itself, pled to, I believe, a misdemeanor—I'm not certain—for claiming reimbursement for advocacy services.

[Subsequently, Mr. Erspamer provided the following information:]

We did not represent Swords to Plowshares in connection with these matters.

Mr. **Erspamer**. So I think your characterization of those events was not very accurate.

Second, turning to the IG investigation, in this case——

The **Chairman**. I hate to interrupt the witness, but I think basically we've got the feel for where you're coming from.

The Chair would like to recognize the gentleman from New York, Mr. Solomon. And, for the record, you can further your statement.

Mr. Solomon.

Mr. **Erspamer**. I would appreciate an opportunity to finish my answer at some point in these proceedings, but I will be happy to answer your additional questions on other subjects.

Mr. **Solomon**. Mr. Erspamer, yesterday at a news conference in the Capitol here you were reported as saying that the VA has been filing false information in the *NARS* case. I would like to know if you did say that. I wasn't at that press conference. And if you did say it, can you support that statement?

Mr. **Erspamer**. I don't know what you mean by filing false information. I don't believe I made any statement in those words. If you can clarify your question, perhaps I can answer it. I did not state anything about filing "false information."

I believe the judge concluded that the VA had filed discovery responses that contained inaccurate, misleading information and distortions, if that's what you're referring to. I'm not certain.

Mr. **Solomon**. Well, I was referring to a quote from you, that I was told by Members that you made at the press conference the other day. Let me just get on, because I don't have much time here, either.

Do you have any actual documentation where the Veterans' Administration actually shredded any documents that were relevant to the California court case? As the word "shredded" is usually used, is it not true that no such action took place? I'm talking about, you know, intentionally shredding information.

Mr. **Erspamer**. Yes, there is considerable testimony in the record on that point, and I can——

Mr. **Solomon**. Do you have any documentation?

Mr. **Erspamer**. Pardon me?

Mr. **Solomon**. Do you have any documentation?

Mr. **Erspamer**. Yes. I'm just giving you the answer to the question, if you will permit me to finish. There is a substantial body of evidence in the record of the *NARS* case, mainly circumstantial, that the documents were shredded intentionally, and after receipt of the document request from the plaintiffs. I believe, if I can refer you to the court's opinion, the court specifically recognized this fact. In making her order of January 8th, the court stated "I think there is significant circumstantial evidence showing that document destruction did occur after receipt of the 8th request." She goes on to discuss the testimony of Mr. Tomasek, some testimony from Mr. Dunlap, testimony from Mr. Bissel, testimony from Mr. Nicholson, and testimony from others. Then she goes on to state, on the other hand, there is some other testimony that might be interpreted to indicate the VA did not do this willfully or intentionally.

As for the relevance of the documents, that was admitted by counsel in the district court, Mr. Stoll, that documents were physically shredded that were relevant to the litigation. That's an admission and that's in the record. I think that's very, very clear.

[Subsequently, Mr. Erspamer provided the following information:]

Finally, the anonymous letter dated July 11, 1986, stated that intentional document destruction was ongoing.

Mr. **Solomon**. I am really just trying to get to the bottom of it, because when you use the word "shredded", it seems to indicate there was some kind of willful intent to hide something. I took the liberty of contacting the VA just to find out, and they don't even have a shredding machine.

Now, in my office, and in every office, when we can't physically handle all of the paper that we have, we destroy paper. But there is a heck of a difference, I think, in destroying or disposing of records that are no longer worthy of saving and "shredding" them.

Let me just get on to one more question here. You mentioned in your statement that you represented an organization called Swords to Plowshares. Is Swords to Plowshares a party plaintiff in *NARS* v. *Walters*?

Mr. **Erspamer**. Currently, they're not. After the *NARS* case was remanded to the Supreme Court, the case was refiled as a class action on behalf of a class of atomic veterans. The Agent Orange and post-traumatic stress aspects of the case was dropped at that time, based upon the ruling made by the U.S. Supreme Court.

Mr. **Solomon**. Mr. Chairman, I would like at this time to read a letter from the United States Attorney's office in San Francisco, and then the witness can comment further on it because he touched on it, but not in this context. The copy of this letter I think came from the Inspector General's office. It is addressed to Mr. Gordon Erspamer. It has a salutation "Dear Gordy". It says, "I thought you might be interested to know that on November 6, 1984, Swords to Plowshares pleaded guilty to a misdemeanor and agreed to repay $19,210 in connection with its counseling service contract. In my view, an apology would also have been appropriate to deal with all of the allegations of misconduct which were hurled at the VA officials, both in court and in the press, by you and your clients."

I just think it's appropriate to have this read into the record because, you know, we want to get to the bottom of anything that might have been done wrong, and we certainly want to get to the bottom of anything where veterans are not being taken care of properly. But we also don't want to heap any undue criticism on people that work in the VA. Many of them are veterans and most of them do a tremendous job. So I just thought we ought to have both sides of this.

Mr. Chairman——

Mr. **Erspamer**. Excuse me. If I could comment on that, since you took the liberty of introducing it into the record, it certainly is quite a digression from what I understood to be the scope of these proceedings. But I can understand that you're trying to attack us in any way possible—

Mr. **Solomon**. I'm trying to what?

Mr. **Erspamer**. Attack us. Obviously, that was your intent in that particular letter—but I would like to emphasize, if I could, about the introducing imbalance of resources piece of litigation or a matter such as that involving Swords to Plowshares.

Swords to Plowshares was placed in the unenviable position in that particular matter of trying to fight a huge agency possessing vast resources with no resources of its own. Their funds had all been cut off by the VA. As I indicated, they were forced to lay off their staff. They had no ability to even pay for counsel to represent them.

[Subsequently, Mr. Erspamer provided the following information:]

In short, they had no ability to defend themselves, despite the fact they may have had dispositive defenses.

Mr. Erspamer. So what a party does under those types of situations, in terms of pleading to a misdemeanor, certainly is not necessarily a reflection on the merits of the particular matter at issue.

But on the whole, I would say the entire introduction of this into these proceedings is a total digression, and is irrelevant to the issues framed by this proceeding, at least as I understand them, and I see no point in your raising these issues. It has no relationship to the charges before this committee today.

Mr. Solomon. Mr. Erspamer, I think you brought up the issue of Swords to Plowshares. I didn't. I was just trying to point out that they pled guilty, and that's all I wanted to make a point of.

Mr. Erspamer. What does that have to do with these proceedings? I would like to know.

Mr. Solomon. I would yield back the balance of my time, Mr. Chairman.

Mr. Evans. Would the gentleman yield? I think he brought up Swords to Plowshares only in answer to a question that the chairman posed to him.

Mr. Erspamer. That was it, exactly.

Mr. Solomon. Oh, no. I think it was in his testimony, Mr. Evans.

Mr. Erspamer. No, it is not. It is not in my prepared testimony.

Mr. Solomon. Yes, it is.

Mr. Erspamer. There is no reference to Swords to Plowshares in my prepared testimony. I'll stand by that.

Mr. Solomon. Mr. Erspamer, why don't you read the front page of your testimony. It's on the front page.

Let's get on with the meeting here.

The **Chairman.** I would certainly agree to that.

I would suggest to the witness, you know, that you're coming in here with a chip on your shoulder. Just answer the questions. You know, I'm really trying to be open on this hearing, but you're determined not to let us do it.

Mr. Erspamer. Oh, I'm perfectly willing to answer questions.

The **Chairman.** The Chair recognizes Senator Cranston.

Senator **Cranston.** Good morning, Mr. Erspamer.

Mr. Erspamer. Welcome to Washington, huh?

[Laughter.]

Senator **Cranston.** I appreciate your flying in from San Francisco to testify before us today. I have several questions on which I would like to ask your views.

First, do you feel that the VA has adequately satisfied its discovery obligations since the court ruled on your discovery motions on January 8, and do you feel you will receive the documents to which you're entitled under the discovery rules?

Mr. Erspamer. Yes. Thank you for that question.

I believe since the court rule on January 8, and with the subsequent order by the magistrate compelling the VA to produce particular documents, we are receiving the cooperation of the VA in producing documents.

My only complaint would be that they have gone from one extreme to the other. We now have a situation where they have produced millions of pages of documents that we have to sort through. We don't mind doing that, but it takes a lot of work. But they have produced documents such as the Iranian hostage files, AIDS ratings, hernia binders, Spanish-American War files, black lung files, travel vouchers and so on, and a very, very great effort has been required on our part to sort through a massive amount of extraneous material. I do believe, however, that they are cooperating and are producing a large volume of material, and among the documents that they are producing are documents responsive to our request.

Senator **Cranston**. Do you believe that the system for ensuring proper compliance with the plaintiffs' discovery requests, which the VA has put in place in accordance with the court's order, is sufficient to meet its purpose?

Mr. **Erspamer**. Well, the procedure—Pardon me again?

Senator **Cranston**. Do you believe the system that the VA has put in place for ensuring proper compliance with plaintiffs' discovery requests is sufficient to meet its purposes?

Mr. **Erspamer**. I'm not fully familiar with the system that they have implemented internally to ensure discovery compliance. They have submitted a plan to the court for further discovery compliance, and the court has ordered the appointment of a special master. We have commented on this discovery plan to the court, with several additional suggestions, and we have not yet received a response, either from the court or from the Veterans' Administration.

Senator **Cranston**. Could you give us a copy of that comment for the record?

Mr. **Erspamer**. I do not have it here with me, but I can certainly send you one.

Senator **Cranston**. Fine.

[The information appears at p. 136.]

Senator **Cranston**. In your written testimony, you assert that VA claims adjudicators have developed a pattern of activities which enables them to churn claims—that is, to increase the speed with which claims are moved through the system, presumably without regard to how carefully and accurately the claims are processed.

How widespread do you believe these practices are, and can you share with these committees any documentation that demonstrates the existence of churning and its prevalence?

Mr. **Erspamer**. Yes. I believe the VA's own reports—and perhaps you can ask this question of Mr. Abrams and Mr. Boskovich and others—the VA's own internal studies show that the practice of churning of claims is widespread, and it is particularly bad in certain regional offices, including, for example—San Francisco, Phoenix, Washington D.C., Hartford, St. Paul, Baltimore and others.

This process occurs because the VA has a procedure called a "record purpose disallowance" procedure, which allows the VA to request evidence from the veteran and set a date for compliance, and then deny a claim once the veteran fails to supply the requested evidence. As I indicated in my prepared testimony, a pattern began to develop where adjudicators would improperly deny claims and take work credits based upon a veteran's failure to respond to a request for evidence, the same work credit they would get if they had processed the claim through to its conclusion.

A wide variety of abuses of these processes began to develop nationwide and developed into several patterns, and these included asking for information that they knew the veteran didn't have; asking for information not needed to adjudicate a claim; asking for information and immediately entering denial of the claim even before the veteran had an opportunity to respond; asking for information and obtaining a response from the veteran, yet still entering a record purpose disallowance, and various variations on this theme.

I believe it is a serious problem because it leads to a situation where many claims are not adjudicated on the merits.

Senator **Cranston**. Can you give us whatever documentation you have that would substantiate those statements——

Mr. **Erspamer**. Yes, I can.

[Retained in committee files.]

Senator **Cranston** [continuing]. And go to the prevalence of these approaches?

Mr. **Erspamer**. Yes.

Senator **Cranston**. In your written testimony you also charge that veteran service officers, as well as the VA, have "tolerated or acquiesced in these unlawful practices." Can you provide any documentation of that charge?

Mr. **Erspamer**. The documentation of that charge consists of basically the same documents, combined with the following facts. Service officers spend——

Senator **Cranston**. I'm asking specifically about the service organizations.

Mr. **Erspamer**. Yes. I'm addressing that.

The service organizations, I believe, that that information would consist of the fact that they represent virtually all claimants before the VA. None of this has ever been raised before in any setting, as far as I know. Most of the record purpose disallowances that are issued are in cases where the service officers represent the veterans. The statistics will show that.

Senator **Cranston**. You're inferring their acquiescence or intolerance, then?

Mr. **Erspamer**. I'm inferring it, from the fact they've never done anything about it.

[Subsequently, Mr. Erspamer provided the following information:]

And based upon a series of site visit reports by VA auditors to regional offices which state that service officers were very complimentary concerning the performance of VA adjudicators in regional offices where these problems were particularly acute.

Senator **Cranston**. In your written testimony you allege that there are procedural and substantive irregularities in the claims adjudication process which are likely to result in unfair and inequitable treatment of veterans applying for benefits, including improper denial of hearings, premature denial of claims without notice based on so-called "record purpose disallowances", and tolerations of high error rates.

Short of remedial legislation which, of course, will have to come from the Congress, and which I intend to pursue vigorously, what steps do you believe the VA itself should take to ameliorate these problems?

Mr. **Erspamer**. I think it's difficult to do, given the system as it exists, because I don't think the controls that exist are sufficient to monitor, to discover, and to correct these types of practices.

I think it is illustrated best by the St. Petersburg regional office situation, where the adjudicators in the St. Petersburg regional office were conditioning the right to a hearing in ways that violated VA rules and regulations. This came to the attention of the Compensation and Pension Service in 1984. There were several pieces of correspondence that went back and forth about correcting the problem, as late as the summer of last year, and several years after the problem was identified, this practice is still occurring in the St. Petersburg regional office. So it's a problem, I think, partially attributable to the fact that the Compensation and Pension Service does not have the ability to enforce its rulings about problems of this type with any sanctions or any other enforcement mechanism.

But I think the root of the problem is the absence of judicial review, the absence of attorneys in the system, and the other systemic characteristics of the VA adjudication system I have described in my testimony.

Senator **Cranston**. Thank you very much. I have more questions, but my time has expired.

Mr. **Erspamer**. Thank you.

The **Chairman**. Thank you, Senator Cranston.

The Chair is going down the list of Members, both Senate and House, by the way they came in when the meeting was started.

The Chair would recognize the gentleman from California, Mr. Edwards.

Mr. **Edwards**. Thank you, Mr. Chairman. I just have one question. But first I would like to welcome the witness and point out that he has devoted 2,750 *pro bono* hours for veterans. That's a remarkable record and you should be proud of it, Mr. Erspamer.

Mr. **Erspamer**. Thank you.

Mr. **Edwards**. My question was referred to by the gentleman from New York, Mr. Solomon, and it is this. Was evidence introduced at the *NARS* hearing that indicated that the VA's destruction and suppression of documents was willful, or was the destruction and suppression innocent or routine, as the VA contends?

Mr. **Erspamer**. It's a matter, I think, of interpretation of the evidence, because there was certainly no one who got up and said "I destroyed these documents in order to avoid producing them to the plaintiffs in the *NARS* case." However, there was substantial circumstantial evidence to show that it was willful, as the court recognized, and certainly there was some testimony by those VA officials who actually participated in the destruction, that they felt it was innocent.

Added to these facts are the facts adduced in the anonymous letter, which was not introduced into evidence because it was hearsay, but which certainly made the charge that the document destruction was willful. So I think it gets down to the question of how you interpret the facts, based upon the testimony, and who you believe.

Mr. **Edwards**. Well, did the judge reach any conclusion, or did the judge find it necessary to reach the question of willfullness?

Mr. **Erspamer**. The judge did not find it necessary to find that there was willfullness in order to order the sanctions. She did, however, note that there was significant circumstantial evidence showing that the document destruction occurred after the receipt of the document request.

Mr. **Edwards**. Thank you.

Thank you, Mr. Chairman.

The **Chairman**. Thank you, Don Edwards.

The Chair would like to point out to the Members who are here, let's don't forget we have the GI bill up this afternoon. I would hope as many Members as possible could be over there. It will probably come up about 12:20. We hope that we can get some extra time, if any Members want to comment on the peacetime GI bill.

The Chair would like to recognize Senator Mitchell.

Senator **Mitchell**. Thank you, Mr. Chairman.

Mr. Erspamer, a broader question is, of course, the entire method of determining compensation by the Veterans' Administration. Since its inception, it has been nonadversarial, based upon the presumption of preference to the claimant, which has made it unique. That is obviously the rationale underlying the lack of judicial review; you don't need lawyers because this is not an ordinary adversary process. That has been the concept, at least.

The San Francisco case obviously comes as a rude shock to any who have accepted that premise. I found the statement by the judge, and I now quote as I did in my opening statement "that the VA has shown a deliberate recalcitrance in providing discovery and has taken other actions which demonstrate its callous disregard to the lawful processes of the court" a very disturbing commentary.

Could you tell us, please, in detail, in the time that remains, what steps did the VA take—what actions occurred, or inactions—that led the court to make such a very strong statement, particularly indicting a Government agency? It is a tragic thing when these practices occur in any litigation, and it is particularly tragic when there is a Government agency pursuing this, and even more so when the claimants are men and women who have served the Nation in time of crisis.

What happened? What was it that led to this comment by the judge?

Mr. **Erspamer**. The only way to answer your question would be in an unacceptably long manner. But I will briefly summarize the course of events. The case, of course, was filed in 1983. It was based upon two theories—a facial challenge and an "as applied" challenge. A substantial amount of discovery occurred in the 1983 to 1984 period, including requests for documents that were covered by the ultimate document destruction that occurred.

What happened was this: The VA never set up a system for responding to discovery requests to assure that the plaintiffs would get the evidence that they requested. That's one problem. Two, in terms of the conduct of its own affairs internally within the VA, the VA continued to operate as usual for the entire pendency of the action with regard for the destruction of its records. They did not keep documents that related to the case; in fact, they admitted before the court that they had actually destroyed—I think their counsel's admission was millions of pages—of documents potentially relevant to the *NARS* case.

Then we get into the specific misrepresentations made in papers filed with the court. Being a former Federal judge, you're familiar with document request responses. Dating back to 1983, the court found there were a series of factual misrepresentations, distortions and misinformation supplied in responses to document requests. For example——

Senator **Mitchell**. Were these statements made by counsel for the VA?

Mr. **Erspamer**. They were signed by counsel, and they were signed, I believe, both by in-house counsel and the Assistant U.S. Attorney in San Francisco.

For example, the plaintiffs had, throughout the case, requested the VA to identify ionizing radiation claim files for purposes of production. That had been asked in interrogatories, in document requests, and so on, directed to that issue. Throughout a period of 4 years, the VA separately, at numerous times, made misrepresentations to the effect that, in order to identify which files were ionizing radiation files, they had to manually sort and review 35 million claim folders. And this statement is repeated many times in the VA's responses. Virtually every discovery request touched on this in some way throughout the case.

We came to find, in the summer of 1986, in taking other discovery and through another source, that the VA had, in effect, since 1982, a system for tracking ionizing radiation claims of a pending variety, called the Pending Issue File. We also came to find that in 1984 the VA had developed a system called SIRS, Special Interest Rating Systems, that identified resolved ionizing radiation claims by date, name, claim number, and so on.

This, I think, was the most shocking fact to the court, because we went through 4 years of litigation believing there was no way that we could get at these ionizing radiation claim files without manually reviewing 35 million claim folders. The court was truly, I believe, shocked when it found out there were computer systems in effect, that all it would require was the push of a button and you would have a listing of all these ionizing radiation claim files.

Senator **Mitchell**. My time is up. I would just ask that you submit a more full statement in writing, and would you also respond in writing on a description of the work credit system for claims adjudicators, and whether there is any evidence as to that practice being national in scope or limited to the San Francisco office. Could you provide that in writing?

Mr. **Erspamer**. Certainly, I will do that.

Senator **Mitchell**. If you would do that, please. My time is up.

Mr. **Erspamer**. Yes, sir.

[Attachments B, C, and D, submitted by Mr. Erspamer, are retained in committee files.]

[Subsequently, Mr. Erspamer provided the following information:]

The basic principle of the work credit system is that adjudicator productivity can be measured in terms of completion of certain tasks. The VA has prepared a schedule that assigns different work credits, expressed in hours or fractions of hours, for certain types of tasks, and no credit for certain others. For example, an adjudicator receives a credit of 1.27 hours for a rating decision on an original compensation claim, but no credit for responding to claimant correspondence. In turn adjudicators' performance for purposes of promotion and pay increases is measured largely by how many work units have been accumulated. It is analogous to a batting average. This system creates a great incentive for adjudicators to process claims quickly or prematurely, because the same work credit is conferred for every task of a certain type, regardless of the amount of time actually spent.

Senator MITCHELL. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

The Chair recognizes the gentleman from Illinois, Mr. Evans.

Mr. EVANS. Thank you, Mr. Chairman.

Gordon, you indicated you need to follow-up on the first question asked of you, regarding the second part of the IG question that the chairman asked you, and I would give you that opportunity now, if you wish.

Mr. ERSPAMER. Yes. The second Inspector General report referred to was with respect to the report on misconduct in the *NARS* case. Of course, each time a report is done, it's assigned to different people, and I think the quality of such reports varies accordingly. But that particular report was assigned to a person who did, I believe, a rather cursory job. I understand the interviews were very short, generally 10 to 15 minutes—although I think one or two of the witnesses extended to approximately an hour. That report did not uncover any of the damming facts that we ultimately uncovered when we took depositions, 17 depositions of VA officials, which ultimately led to the sanctions. So that report was, I believe, inadequate.

The other report we were referring to is a report done by a completely different group and on an entirely different scale, and that is the 1982 report which found that there were huge discrepancies between the reported error rates by the VA and the true error rates in the handling of claims in general.

Mr. EVANS. Thank you.

I guess there is some problem here on whether the VA shredded documents, or whatever. They did, in fact, destroy documents, did they not?

Mr. ERSPAMER. They, in fact, destroyed documents. I understand the VA officials didn't personally shred the documents, but my understanding, based upon the testimony, was that they sent them out to some other agency within the Government here in Washington who, in turn, shredded them.

Mr. EVANS. But there is evidence that the VA Central Office here in Washington destroyed these documents through delegation or through shredders or putting them in baggies or whatever, that hurt the *NARS* case; is that correct?

Mr. ERSPAMER. That's correct, and I think that was admitted by the Government.

Mr. EVANS. Now, how many times has the Veterans' Administration been fined by the judge in this case, or the magistrate, for discovery abuses in this litigation?

Mr. ERSPAMER. It's been a total, I believe, of four times. Once for a motion to compel in 1983, where they were fined for attorneys' fees involved in the motion to compel production of documents; in connection with the class certification motion in May of 1986, where they were fined under rule 11 for filing a false affidavit; and two other times.

Mr. **Evans.** In fact, they were fined for wasting the court's time; is that not correct?

Mr. **Erspamer.** Yes, they were also fined an additional $15,000 for wasting the court's time.

Mr. **Erspamer.** What did the judge say about the VA's actions on trying to identify the ionizing radiation claims? Do you remember what her statements were?

Mr. **Erspamer.** The court, I believe, said she was quite disturbed and schocked—I don't have the exact language in front of me—but she was shocked by the misrepresentations concerning the SIRS and PIF systems and the misrepresentations made in the papers.

Mr. **Evans.** From your discovery, what does the VA says it does to fulfill its obligation to develop the evidence in a veteran's case?

Mr. **Erspamer.** Typically, it's limited to securing service—medical and service records. That's it.

Mr. **Erspamer.** It doesn't go beyond that to develop the full record on behalf of a veteran?

Mr. **Erspamer.** No, it relies on the veteran to do that. In fact, that's what these information requests are all about. They send them out, and if the veteran doesn't respond, the claim is denied for failure to prosecute.

Mr. **Erspamer.** In your case, have you found out how many claims are abandoned by the VA?

Mr. **Erspamer.** Yes, we have statistical summaries that the VA has produced. It varies from office to office and year to year. I did note, however, that in one quarter of 1983, 80 percent of all the claims decided in the San Francisco regional office were abandonment by the veteran, rather than a decision on the merits.

Mr. **Evans.** Why do veterans abandon their claims?

Mr. **Erspamer.** Generally because they're incapable of handling the complexity of the system or prosecuting the claim to its conclusion.

[Subsequently, Mr. Erspamer provided the following information:]

The administrative abuses and shortcomings described in my prepared testimony compound the problem.

Mr. **Erspamer.** Many of them are disabled—I mean, that's why they're filing the claim. It's a very complicated system, and I think perhaps Mr. Abrams could give you some answers on that. But it is a very, very complicated system.

Mr. **Evans.** On a complex issue of medical evidence or disability, do many of these veterans have the capability themselves of understanding all the complexities or how to present the evidence in the best way to the VA?

Mr. **Erspamer.** Very few do.

Mr. **Evans.** Particularly in cases of atomic veterans, Agent Orange victims?

Mr. **Erspamer.** I think virtually none of the atomic veterans have that capability. I have never met one, in fact, that did.

Mr. **Evans**. You mentioned something called a "records purpose disallowance" in your testimony. Could you tell us what this is and why it's a problem?

Mr. **Erspamer**. First of all, it's a euphemism. A record purpose disallowance or "administrative disallowance" is a disallowance that relates to the "failure to prosecute". It's where the VA requests evidence from the claimant and the claimant fails to supply that evidence within 60 days. The claim is denied by means of a record purpose disallowance, which is distinguished from a disallowance on the merits, but it has the same practical effect.

Mr. **Evans**. That's all the time I have. Thank you very much for your testimony today.

The **Chairman**. Thank you, Lane.

Mr. Florio.

Mr. **Florio**. Thank you very much, Mr. Chairman.

Let me commend you for your written testimony. I had an opportunity to read it last night. It was very succinct, very tough-minded, and I think it was put together very effectively.

Let me briefly run through a couple of questions and try to get short responses, in view of the limitations of our time.

If you were to prevail in your lawsuit, is it your understanding that, by virtue of the remedies that the court would provide to you, that it would provide veterans with no alternatives but to employ lawyers, or would veterans still have the option of using the traditional service officer system?

Mr. **Erspamer**. Oh, they certainly would still have the option. It's basically a freedom of choice principle plaintiffs are trying to espouse in the lawsuit.

Mr. **Florio**. So to the degree that the service officer system currently works well and veterans choose to employ it, they would not be in any way precluded from doing that, if you were to prevail on behalf of your clients?

Mr. **Erspamer**. You're correct.

Mr. **Florio**. Let me use your legal expertise to explain to us a bit about what the impact would be if judicial review was allowed from decisions by the agency. Would it or would it not be the case that there would be a *de novo* hearing required at the appellate level?

Mr. **Erspamer**. My understanding of the bills presented is that it would not be required. It would be based on the administrative record.

Mr. **Florio**. So really what we're talking about is review of the record that was accumulated; there would not be a factual re-presentation of the cases.

Mr. **Erspamer**. Correct.

Mr. **Florio**. The standard of law, as I recall it, from when I was more involved in these things, is that the decision made at the administrative level would merely have to not be arbitrary and capricious, so that the review would be that the administrative agency conducted itself in accordance with the appropriate law and its review of this matter was done in a nonarbitrary and capricious way?

Mr. **Erspamer**. Correct.

Mr. **Florio**. Would you describe that briefly, the impact of that standard?

Mr. **Erspamer**. Well, it would mean that few cases would probably be disturbed on appeal because substantial deference would be accorded to the administrative agency which is charged with the expertise to handle this type of question. So I believe in most cases the agency's ruling would be upheld unless it's totally irrational or unsupported by any evidence of record.

Mr. **Florio**. Mr. Chairman and members, I think that is a very significant part of the testimony that we will be eliciting today from our witnesses and should be emphasized in the record, that what we're talking about is not radical changes occurring if these two matters were dealt with in the way that some of us would like to see them dealt with.

Let me just make the observation that I am very concerned about this whole case and the question that we're dealing with in the context of the VA, but I am equally as concerned, as I made the statement earlier in the record, about the overall thrust of what is happening in the area of administrative law in this Government.

The traditional approach—and it's interesting that we're having the 200th anniversary of the Constitution celebrated this year—that the traditional approach is the Congress makes the law and then the executive branch, with the administrative agencies, carries out the law. I see clearly, particularly in the last number of years, when there has been a change of philosophy as to what the appropriate responsibilities of different branches of office should be. I see clearly an administrative effort, in a whole host of different agencies, to thwart the intent of the legislative body in carrying out the law, that someone doesn't want to or doesn't feel capable of changing the law in the legislative process.

What we have seen in the last few years is redefinitions of the law, nonenforcement of the law, budgetary changes that gut an agency's capability of carrying out the law, and people put in positions of authority who don't adhere to the very belief of the agency or the mandate of the agency in carrying out the law. I have seen it in the Environmental Protection Agency, I've seen it in the Federal Trade Commission, and I see it, I think, here at the VA.

The difference is, in those other agencies where this practice and these abuses have taken place, there is always the ability to go to the court to get remedies, when we have seen clear practices that are arbitrary and capricious in this instance. I realize that there are good faith differences of opinion, but I am at a loss as to justify how it is that anyone cannot want to see due process review of agencies only in those areas that are ultimately determined to have been arbitrary and capricious. I'm at a loss as to understand how there can be differences of opinion as to the option to be able to seek justice in the courts of this country.

Can I ask just briefly, do you feel, on the basis of this experience, that the absence of judicial review authority in this instance in any way lends itself to a less-than-vigilant carrying out of the mission of the law under the system that you've talked about?

Mr. **Erspamer**. Definitely, it does. I have seen manifestations of that in many, many circumstances.

If I could only share with you the hundreds and hundreds of letters I have gotten from individual veterans, complaining about the way the VA has treated them, I think that would perhaps be the best reflection of the effects lack of accountability has on adjudication behavior. The absence of any oversight whatsoever in the courts leads to a situation where administrators can do basically whatever they want. They don't have to be accountable to anyone. I think the fact there is no judicial review and whatever they do is final does affect the day-to-day decisions made in veterans' claims.

Mr. FLORIO. My time has expired and I thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Harris of Alabama was here. Mr. Applegate?

Mr. APPLEGATE. I have no questions at this time. I'm sorry that I didn't get a chance to hear all the testimony. However, I did go over some of your testimony and I will have an opportunity later. Rather than be repetitive at this point, I will reserve some of my questions and come back and ask you and others for answers.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Chairman.

Dr. Rowland.

Dr. ROWLAND OF GEORGIA. Thank you, Mr. Chairman.

I want to ask something about NARS. I'm not real familiar with it, so maybe you can tell me a little bit about it.

It is a nonprofit membership organization of victims of atomic testing?

Mr. ERSPAMER. Correct.

Dr. ROWLAND OF GEORGIA. And it is involved in sponsoring research and studying the scientific, medical and ethical issues concerning ionizing radiation?

Mr. ERSPAMER. Correct.

Dr. ROWLAND OF GEORGIA. Who is doing the research?

Mr. ERSPAMER. It is not being done within the organization. It is being encouraged through universities and the independent projects such as those conducted by the Dodd Center for Radiation Studies in San Francisco.

Dr. ROWLAND OF GEORGIA. Well, I didn't know.

Who is Dr. Dorothy Legarreta?

Mr. ERSPAMER. She is the administrative director of NARS. She basically runs the day-to-day operations of NARS.

Dr. ROWLAND OF GEORGIA. Is she a paid person?

Mr. ERSPAMER. She's a volunteer.

Dr. ROWLAND OF GEORGIA. She's a volunteer.

Mr. ERSPAMER. All the NARS people are volunteers. There are no paid people on the NARS staff. It's a very small organization. I think their 1985 budget was only $33,000.

Dr. ROWLAND OF GEORGIA. So they don't have very many assets then?

Mr. ERSPAMER. No.

Dr. ROWLAND OF GEORGIA. And they depend mostly—For example, this ad that was published would be mostly from outside sources like this?

Mr. **Erspamer**. Yes, and the membership fee is very small. It is $10. Most veterans can't afford to pay much more than that. In fact, a number of the NARS members can't even afford the $10.

Dr. **Rowland of Georgia**. I see. And about how many members are there of NARS, do you know?

Mr. **Erspamer**. I believe there are—I don't know the exact figure. Do you know, Kay?

Mrs. **Hinkle**. It's 1,600.

Mr. **Erspamer**. 1,600.

[Subsequently, Mr. Erspamer provided the following additional information:]

It is now estimated at 2,000.

Dr. **Rowland of Georgia**. 1,600. And you have no paid people——

Mr. **Erspamer**. Pardon me?

Dr. **Rowland of Georgia**. There are no paid people there; everybody is a volunteer?

Mr. **Erspamer**. Everybody is a volunteer.

Dr. **Rowland of Georgia**. Thank you, Mr. Chairman.

The **Chairman**. Thank you, Dr. Rowland.

The other Mr. Rowland was here, and let the record show he was here. Chris Smith also was here.

Tom Ridge from Pennsylvania.

Mr. **Ridge**. Thank you, Mr. Chairman.

Sir, obviously you have drawn some conclusions about the adjudication of claims within the VA system from your experience in this particular case, and you certainly draw some very serious conclusions about how the system operates. I would like to explore some of that with you.

What theory of recovery or relief was employed in order to get the courts to review the conduct of the VA in this particular case?

Mr. **Erspamer**. Well, basically based upon the *Robison* decision, the U.S. Supreme Court decision. Despite the prohibition on judicial review, there is a doctrine in the courts that constitutional questions can be addressed, and that arises mainly out of the *Robison* case. That is the basis upon which this case is in the courts.

Mr. **Ridge**. I guess it's not ironic, but I just want it to be noted for the record that there are some areas where judicial inquiry is appropriate. In this instance it was the constitutionality of the alleged conduct undertaken by the VA that opened the door for the judicial review for your organization?

Mr. **Erspamer**. Well, no—partially. It's the fact that the Federal statute is alleged to be unconstitutional, and that's 38 U.S.C. 3404, 3405.

Mr. **Ridge**. But it's the allegation of unconstitutionality——

Mr. **Erspamer** [continuing]. Of a Federal statute——

Mr. **Ridge** [continuing]. Of this statute is the primary theory employed in order to get into the courts?

Mr. **Erspamer**. That's correct.

Mr. **Ridge**. Okay. Very good. Thank you.

You also mentioned that from your review, I guess, or your analysis of the service organizations' role within the adjudicative process, that you find them to be failing or willfully inadequate. Might

I inquire whether or not you have—I'm not quoting you, but I sense from your response to a couple of questions that you were not happy with how service organizations handle their claims.

Can you give us the benefit of any research that you know of, or any personal experience that you have had, in all the pro bono work that you have done, relating to these deficiencies with the service organizations?

Mr. **Erspamer**. Yes.

Mr. **Ridge**. Do you think it's fairly widespread? I would appreciate the benefit of that research.

Mr. **Erspamer**. Yes. I don't think you totally characterize my statements correctly. I believe my testimony is to the effect that service officers have experienced the most problems and shortcomings in complex claims. I believe I stated in my testimony that I believe that in a garden variety, simple claim, a service officer can do, most times, a very good job. In fact, I think personally that many service officers are very dedicated and they certainly do the best job they can.

But one of the problems that has occurred is there is a whole new species of types of claims that have been generated in the last 10 to 15 years that are way, way more complex than the average claim. And I'm talking about post-traumatic stress syndrome claims, ionizing radiation claims, asbestos claims, Agent Orange claims, these types of claims.

In the complex claims, in my experience—and I have reviewed many hundreds of claim files, and reviewed many other documents—the service officers do not do a good job. They do not have the resources to hire experts, for example. In an ionizing radiation claim, an absolute prerequisite is that you obtain a dose reconstruction under the VA ionizing radiation regulations found in 38 CFR 3.311(b). The only three dose reconstructions ever obtained under those regulations were obtained by attorneys. I know of no instance where any service officer has ever attempted to or, in fact, obtained a dose reconstruction. As a result, those cases are doomed to failure under the regulations.

When I speak about the inadequacies of service officers, I do not do so with an intent to criticize them. I do so in the recognition that their resources are limited, their caseloads are extremely high—and I have seen those statistics—and that they just do not have the resources or the training to properly handle claims, especially complex claims of the type I've described.

In terms of what I base my opinion on, I have spent, as I think I indicated in my testimony, several thousand hours working in the VA area. I have reviewed claim files, many hundreds of claim files, by service representatives. We are currently undertaking a study in the *NARS* case of the claim files to try to develop a composite or a description of how the average claim file is approached by a service officer and what is done and what is not done. Certainly very little is done, unfortunately, on the complex claims. Accordingly, the veteran has the burden of proof, and if the veteran doesn't furnish the information, the veteran loses.

Mr. **Ridge**. I appreciate your responses.

Mr. Chairman, I have several additional questions I would like to ask the witness. May I have unanimous consent to submit them to the witness in writing and have them included as part of the record.

The **Chairman**. Without objection, so ordered.

Mr. **Ridge**. Thank you.

The **Chairman**. Also, Senator Thurmond has a statement for the record and, without objection, that will be entered. Also, Senator Alan Simpson. Without objection, his full statement will be put in the record. Also, Senator Rockefeller of West Virginia has a statement to be included in the record.

[The prepared statements of Hon. Strom Thurmond, Hon. Alan Simpson, and Hon. Jay Rockefeller appear at p. 146, 147, and p. 150.]

The **Chairman**. I believe Marcy Kaptur has left. Bob Smith of New Hampshire.

Mr. **Smith of New Hampshire**. I have no questions at this time, Mr. Chairman.

The **Chairman**. The Chair, in agreement with the Senate, will recognize staff personnel. You don't have to ask questions because we have two more panels. Mr. Ryan, you have no questions.

Mr. Principi?

Mr. **Principi**. I will defer, Mr. Chairman.

The **Chairman**. Mr. Steinberg?

Mr. **Steinberg**. No questions, Mr. Chairman.

The **Chairman**. Okay.

I want to thank our witness. Do you have any further statement you would like to make?

Mr. **Erspamer**. No. I believe most of the points have been covered, thank you.

The **Chairman**. Okay. Thank you very much for being here.

Mr. **Solomon**. Mr. Chairman, I guess we gave unanimous consent to Mr. Ridge, but I would like to have unanimous consent for every Member, including the Senate side, to submit questions in writing.

The **Chairman**. That is a good suggestion. Without objection, so ordered.

[See written committee questions and their response.]

The **Chairman**. The Chair would like to have the next witnesses, the Veterans' Administration employees, Ronald Abrams, Barry Boskovich, and Thomas Kenny, to come to the witness table. If you would limit your statements, it would certainly help us.

You may lead off, Mr. Abrams.

STATEMENTS OF RONALD B. ABRAMS, LEGAL CONSULTANT, VETERANS' ADMINISTRATION; BARRY S. BOSKOVICH, STAFF CONSULTANT, COMPENSATION AND PENSION SERVICE, DEPARTMENT OF VETERANS BENEFITS, VETERANS' ADMINISTRATION; AND THOMAS J. KENNY, STAFF CONSULTANT, VETERANS' ADMINISTRATION

STATEMENT OF RONALD B. ABRAMS

Mr. **Abrams**. Thank you, Mr. Chairman, for the invitation to appear before you today. I have worked for the VA for more than 13 years. I have a strong commitment to the mission of the agency. Thus, I am gratified that the committees are jointly taking this opportunity to examine what I and most employees of the VA see as the principal question that the agency must confront—whether it is being fair to the veterans we are here to serve.

Although I have been invited to testify today not as a representative of the VA but as an individual, I want to make clear for the record that I am, in fact, an official of the VA, and the views that I set forth today are based solely on my experience with the agency. That experience, I submit, has some relevance to the areas of the committees' interests.

For the past 5 years, my work at the VA has focused on studying the question of whether the procedures the VA employs in handling claims for compensation and pension are in keeping with the basic notions of fairness and due process.

As part of my work, I drafted an extensive report entitled "Procedural Due Process—Its Application to the Compensation and Pension Program" of the Veterans' Administration. This report canvassed the agency's procedures for handling compensation and pension claims and assessed whether they passed muster under the law. In that report, I also made a number of suggestions as to how the agency could ugrade its procedures to ensure greater fairness. This report was approved by the Director of the Compensation and Pension Service and sent nationwide. I also prepared a second report, entitled "Compensation and Pension Regional Office Qulity as Measured by Central Office Quality Review." This report analyzed over 1,700 cases, found a number of deficiencies, and recommended that the agency take corrective action.

All of the work I performed for the past 5 years, review of case work done in our field offices for quality control purposes, revisions to the operating manual—the Bible that guides all agency employees—and site visits to various regional offices of the VA, was done principally to protect the rights of veterans by making sure that the agency extended to veterans all the procedural protections they are due.

In sum, my role within the agency has been to identify due process problems in handling compensation and pension claims and to offer solutions. For this work, I have regularly been commended by my supervisors at the Veterans' Administration, at least up until the time the *National Association of Radiation Survivors* v. *Turnage* litigation reached the discovery phase.

In my view, there are systemic problems in the Veterans' Administration, and they take two forms. First, the agency has not effectively enforced its own regulations relating to the procedures to be used in processing claims for compensation. To those of you who have any doubt that this is the case, I urge you to read the report entitled "Compensation and Pension Regional Office Quality as Measured by Central Office Quality Review." Although it is over a year old, in my view it accurately reflects the situation today.

Second, some of the agency's key directives and regulations need revision. They need to be fortified to provide greater protections to the veteran, not only to meet minimal constitutional requirements, but to assure fairness. In this regard, I would like to state a personal view, which the VA may not share. In my opinion, the agency has a higher duty than other agencies to be fair. Proceedings before the agency are ex parte in nature. The agency operates in what is intended to be a nonadversarial manner; indeed, we are obligated to assist the veteran in developing facts pertinent to his claim. Most importantly, we are here to serve heroes. The VA should not wait for the courts or Congress to force the agency to be fair to veterans. The heroes that defended our freedom deserve better treatment.

The *sine qua non* of fairness is time. It takes time to be fair. It takes time to help the veteran document his claim. And it takes time to process often complex claims fairly. In my judgment, there is an inevitabe conflict within the agency. On the one hand, there is a genuine pride and commitment to our mission, and dedication to serving the veteran. On the other hand, however, there is a need to process claims in a timely and efficient fashion, which often takes place at the expense of the due process rights of the veteran. In my judgment, the agency is now regularly sacrificing the procedural rights of veterans on the alter of managerial efficiency. I urge the committees to take a careful look at the agency's practices to ensure that they measure up against well-recognized constitutional standards.

There is one final point I would like to address. It is also no secret that I have raised concerns about the adquacy of the agency's compliance with discovery requests in the *NARS* case. In my view, the agency's response—which apparently was to hide documents suggesting due process problems within the agency—reflects the agency's own doubts about the strength of its legal position. I deplore the agency's acknowledged failure to meet its clear-cut discovery obligations.

However, I think that this issue is of secondary importance. The key question that needs to be answered, both here and in NARS, is whether the agency is treating veterans reasonably and fairly. I would hate to see that issue obscured.

I would be happy to take any questions.

[The prepared statement of Mr. Abrams appears at p. 154.]

The CHAIRMAN. I thank the gentleman for his fine statement.

The Chair recognizes the other two gentlemen for 5 minutes each, or less. Mr. Boskovich.

STATEMENT OF BARRY S. BOSKOVICH

Mr. BOSKOVICH. Mr. Chairman and members of the U.S. Senate and the U.S. House of Representatives Committees on Veterans' Affairs, my name is Barry Boskovich and I have been employed by the Veterans' Administration since 1970. Thank you for the opportunity to appear before you today.

My full 9-page statement has been filed with the committee. In it I outline my career with the Veterans' Administration and express some of my concerns about the due process problem in the processing of veterans' claims that have come to my attention. I point out that these problems are not merely technical but lead to actual harm to claimants. I also describe my involvement in the *NARS* v. *Turnage* case, which began in July 1986, when I informed my supervisor about the possible destruction of records responsive to the document request in the *NARS* litigation and the possible nonproduction of requested documents. I recount how station files were cleaned out and that one consultant told me he threw out everything that stuck to his fingers. I described how, when I expressed concern about this document destruction, I was told to mind my own business. I explain how one supervisor said that, while he was in the process of producing documents requested in the *NARS* litigation, he put his scruples in a jar. I would now like to continue on page 5 of my statement.

During the course of depositions taken in the *NARS* case, I was identified by Mr. Tomasek as someone he had talked to about the destruction of records. As a result, I was asked to give two depositions and to testify at a hearing in San Francisco in the *NARS* case as an official of the Veterans' Administration.

After my first deposition, I was given the opportunity to correct the transcript of my deposition. Mr. Zeglin, the Deputy Assistant General Counsel of the VA, told me to be absolutely certain I could prove everything I said. As a result, I revised some of my statements to soften points that I knew to be true but could not independently corroborate. Because of the changes, I was requested to give a second deposition.

On the night before my second deposition was taken, Mr. Zeglin called me at home to tell me the deposition would be in Washington rather than in San Francisco. He also told me I should be very careful how I answered the questions in my deposition. He said, "You may not know this, but you are the chief witness against the Government."

Subsequently, I found two files that I thought should be identified to those who were compiling the documents responsive to the NARS request. One file was called "NARS" and the other was called "Due Process".

My immediate supervisor, Mr. Rice, asked me to inform my second-level supervisor, Mr. Spindle, and also Mr. Hickman, in writing that I had found the files. After I did so, I was reprimanded by Erin Orr, one of Mr. Hickman's staff members, who was collecting evidence to be submitted for *NARS*. She told me to stay out of this, you don't know what this is about.

In addition, I was called in to Mr. Spindle's office and told by him that I had been warned to stay out of it, but I was now involved. He told me not to put anything else about the case in writing. If I found any other documents or sources of information, I was to inform him and he would decide whether to pass it on.

I was also told to refrain from talking with or eating lunch with Mr. Abrams. Mr. Spindle told me I needed to make new friends. I told him I was concerned about the VA but he said I should be more concerned about my wife and family. He didn't explain what he meant. I don't believe that Mr. Spindle was personally making a threat, but I do believe he was sending me a message of what had been discussed by his supervisors. Mr. Spindle told me that at a recent staff meeting held by the Director of Compensation and Pension Service, one or more supervisors, led by Mr. Dunlap, indicated that involvement in the NARS discovery process should have a negative effect on my evaluation, as well as those of Mr. Kenny and Mr. Abrams.

Mr. Spindle also told me at the meeting how to answer questions at the Federal court hearing in San Francisco. Mr. Spindle told me to answer only yes or no. He also told me to answer only the specific question asked. He gave me an example. If asked "Was the world round", I was to say "No", because the world is not round; it is spherical.

I was also frightened because Mr. Kenny told me he had previously received a death threat typed on Government bond. He told me he did not know for sure why he had received it. I was also concerned because after this testimony in San Francisco Mr. Abrams was given a drawning of a swastika inside of a Star of David by the former adjudication officer at the Washington regional office. I am not aware whether any action was taken, although Mr. Abrams' supervisors were informed of this incident.

Mr. Abrams, Mr. Kenny and I have been told by Mr. Spindle that we are now having a portion of our work, some of which refers to due process, reviewed by Mr. Hickman's staff and occasionally by Mr. Dunlap personally. While there is no prohibition against this procedure, this review by other peers and supervisors has not happened before.

I have always been, and I will continue to be, a loyal employee of the Veterans' Administration, an agency that is dedicated to serving veterans, their spouses, and their children. We do not manufacture automobiles, refrigerators, or widgets. We serve the Nation's veterans.

I am not an attorney and cannot give you all the legal reasons that due process should be granted to claimants, but I do know what is reasonable and fair. Veterans, their spouses and children, must be given a fair shake to get benefits, especially when it does not require an undue burden on the agency. I hope that my statement here today will further this goal.

This concludes my prepared statement, Mr. Chairman. I would be pleased to answer questions at this time.

[The prepared statement of Mr. Boskovich appears at p. 159.]

The CHAIRMAN. Thank you very much.

Mr. Kenny.

STATEMENT OF THOMAS J. KENNY

Mr. KENNY. Mr. Chairman and members of the committee, my name is Thomas Kenny. I am a staff consultant employed by the Veterans' Administration. I have been an employee of the VA since 1974, and a staff consultant in the Central Office since 1978. I am proud to have served veterans during my 12 years I have been employed at the Veterans' Administration.

I am honored that you have invited me to testify about the failure to comply with discovery requests in the case of *NARS* v. *Turnage*, and about the VA's responsibility to provide veterans with due process in the adjudication of claims.

At your request, I am here as an individual and not in my capacity as an employee. But any knowledge that I may have about matters of interest to the committee is a result of my being an employee of the VA.

Concerning the failure to comply with discovery requests, I did not have any responsibility for providing VA documents in response to the original discovery requests in the lawsuit. As I indicated in my deposition in the case, and in my court testimony, my knowledge of these matters in this case is second hand.

Concerning due process for veterans in the adjudication of claims, since I am not a lawyer, I can't talk about due process in a technical legal sense. I can tell you what I know from my experience about problems with claims adjudication.

To put my information in perspective, I need to mention briefly my history with the VA. During my first years, I was an adjudicator, and then a senior adjudicator, in the Los Angeles regional office. These jobs involved examining cases to assure that we had properly followed the laws, regulations and instructions in the allowance and disallowance of claims.

For approximately 2 years after that, I was a member of the policy staff in the VA Central Office, with the Compensation and Pension Service.

From May 1980 to the summer of 1985, I worked in the field operations staff of the Compensation and Pension Service. This job involved the analysis of the performance of field stations concerning quality, timeliness and productivity. During this 5-year period, I also participated in approximately 25 site visits to stations. These site visits involved a comprehensive review of the adjudication operations at regional offices and centers.

Since the summer of 1985, I have been in my current position, which involves the writing and implementation of directives that stem from laws and regulations concerning the compensation and pension benefits program of the VA.

I would like to speak of specific findings that I found as a member of the field operations staff, starting in late 1982. In late 1982, the site visits to stations were expanded to include field personnel and other Central Office personnel and became much more comprehensive in nature. During this period, I participated in approximately 12 site visits to VA stations throughout the country. Each site visit team prepared a report of its findings after it returned.

I recently reviewed the 12 site visit reports that I helped prepare during this period. I would like to discuss two major problems that are revealed in 6 of the 12 reports. At these six stations, we reviewed a total of approximately 329 cases to check on certain aspects of claims adjudication. As a result of this review, I observed major problems in two areas that I considered to be particularly significant:

First, that approximately 25 percent of the cases reviewed at the six stations had not been put into the computerized case control system as they should have been.

Second, about 10 percent of the cases showed either duplicate controls established and cleared or controls that had been prematurely cancelled.

Let me explain the significance of this as it relates to the adjudication of claims.

The failure to enter cases into the computerized case control system causes delays in handling the cases and makes it difficult for the VA Central Office personnel to ensure that stations are adjudicating cases accurately and properly. When a claim is received, the case is supposed to be placed under computerized control within 2 days after receipt by the adjudication division. Using this control system, the Compensation and Pension Service has established procedures to ensure the timely processing of claims. Managers are required to review claims that have not been finally adjudicated. The purpose of these reviews is to assure that a case is adjudicated properly and accurately.

If a claim is not placed under the control system, or if local management decides that it is to its advantage to show a later date of claim than is the fact, then management may never have the opportunity to review an old case. Also, not placing cases in the control system promptly can create the false impression that a case is being processed in a timely manner.

The clearing of the control is the indication that the adjudication responsibility in the case is completed. Sometimes we found cases that had been cleared from one control and re-established under another. In these cases, the station received credit for having completed a case when the case was not, in fact, completed. By re-establishing the case under a new control, new time lines for action were established. These new time lines would make it appear that the case was being handled timely. Then, when this new case had been cleared, the station would get credit for having cleared it. The result: two credits for clearing in what is really the same case.

We also found a variation of this process, in which the initial case was cancelled rather than cleared before being re-established. A cancellation does not result in a credit, so these situations did not eventually produce double credits. However, the problem of improper appearance of timeliness would occur, just as in situations where cases had been cleared and re-established.

Timeliness and productivity measures can relate to VA employee performance evaluations. Although the VA does not have uniform nationwide performance standards for VA employees responsible for claims adjudication, logic and experience indicate that timeliness and productivity measures are often a factor in evaluating adjudication officers' performance. Where timeliness and productivity measures are used as a factor in evaluating the performance of VA employees responsible for claims adjudication, those employee evaluations will be distorted if based on inaccurate measures of timeliness and productivity. Manipulation of these measures overstates individual and office performance.

I have not been on any site visits since the summer of 1985. I do not know what action the VA has taken since then to correct the problems I observed and to enforce requirements for case adjudication.

This concludes my statement, Mr. Chairman. I would be pleased to answer any questions at this time.

[The prepared statement of Mr. Kenny appears at p. 168.]

The **Chairman**. Thank you very much, Mr. Kenny.

I have one question, but I will submit it for the record. I have no other questions. Mr. Solomon?

Mr. **Solomon**. Mr. Chairman, I know it is fast approaching 12 o'clock and we have other witnesses, and I know we've got the GI bill on the calendar. That is terribly important, too.

I have had difficulty following some of the testimony of the three witnesses. A lot of the testimony just seems to be contradictory, although Mr. Kenny's statements, it seems to me, pretty much indicate that the system does work. Again, Mr. Boskovich mentioned some testimony by Mr. Zeglin. Just in conversations with people that have talked to Mr. Zeglin, he says he didn't say the things that were quoted in that statement.

I would like to be able to submit questions, I guess, to all three witnesses, as well as some of the people that are mentioned in the testimony by these three witnesses. For instance, if we could submit a question to Mr. Zeglin, it might be helpful, too, just to try to sort this thing out and get it straight in my mind, and I guess in the mind of everybody.

One quick question of Mr. Kenny. Mr. Boskovich says that you received a death threat typed on Government bond, but you didn't mention it in your statement. Did you, and who have you told about that?

Mr. **Kenny**. Yes, sir, I did receive it. It was received well before the *NARS* situation, so I put no relationship to it concerning *NARS*.

Mr. **Solomon**. Oh, it had no relationship to it?

Mr. **Kenny**. No, sir.

Mr. **Solomon**. Okay.

Mr. **Kenny**. The second part of the question is, I did talk to the Federal Bureau of Investigation about it, after being referred to them by the local police.

Mr. **Solomon**. I see.

Mr. Abrams—again I'm just really confused here. In 1985, for instance, you wrote a paper mentioned by you and by plaintiffs in the litigation, entitled "Procedural Due Process—It's Application to the Compensation and Pension Program". I think you got an award for that or something, didn't you?

Mr. **Abrams**. Yes, sir.

Mr. **Solomon**. You mentioned it in your testimony and I was trying to follow that and also follow some other things that we've been doing here.

Did you cite or give credit to your source material in that paper?

Mr. **Abrams**. Yes, sir. Throughout the paper I cited and gave credit to my source materials. In fact, it was reviewed by every supervisor in the Compensation and Pension Service. It was checked over carefully. Mr. Moore sent it out to every office that we have, and I received an award for it from Mr. Vogel.

Mr. **Solomon**. Mr. Chairman, I have a lot of other questions, and I'm sure you won't mind if we submit them.

But I would just like to point out that Pat Ryan, who is now the deputy chief counsel for this committee, had a paper which was called "Procedural Due Process" that was written way back in 1982. I must tell you that, in comparing your paper, Mr. Abrams, and the earlier paper—I have them both here in front of me—that portions of your paper, including page 3, seems to be identical to Mr. Ryan's paper, and that other portions are obviously closely paraphrased or borrowed from Mr. Ryan's paper, with no credit given that I can find here.

Mr. **Abrams**. That's not true, sir. I went up to the General Counsel and reviewed everything I could find that was written about due process, and I mentioned it to the Director of the Compensation——

Mr. **Solomon**. Just for the record, I would like to ask that the two papers be placed in the committee's file for the hearing. They are too voluminous to print in the record. But I think if they went in our file—I would just like to have everyone take the time to read through both of these papers.

Mr. **Bryant**. Will the gentleman yield?

Mr. **Solomon**. I would be glad to yield to the gentleman.

Mr. **Bryant**. Inasmuch as you have, in one respect or another, suggested some wrongdoing on the part of this witness, I would like to let him answer fully your question.

Mr. **Solomon**. He's welcome to.

Mr. **Abrams**. Thank you.

I went to the General Counsel and researched everything that they had written, including that particular paper. I mentioned that to my supervisors when I included it in my paper, and they complimented me for it. This was a white paper sent to the Director of the Compensation and Pension Service. It was a compilation of many people's views, and he well understood that. Not everything in the paper came out of my head. Obviously, I researched it and quoted many people within the VA including several other VA employees. In fact, I did mention to Mr. Zeglin that, in response to the request for information, that the General Counsel had information that should have gone to the plaintiffs as well.

Mr. **Solomon**. I just wanted to, for the record, give credit where credit is due, to Mr. Ryan. He is a very capable member of this staff and appreciated.

Mr. **Abrams**. I called him and thanked him.

Mr. **Solomon**. I will submit the rest of my questions in writing.

The **Chairman**. All right. Without objection, other questions may be submitted.

Do any other members have any questions or comments from our witnesses?

Mr. **Edwards**. Mr. Chairman.

The **Chairman**. Don Edwards.

Mr. **Edwards**. Thank you.

We thank the witnesses for coming here today. The allegations and the descriptions of the harassment you have gone through is deplorable, but you did have the courage to come here today without subpoenas. I know the chairman and all of us would want you to be very certain that, in the event there is any more harassment, any whatsoever, we want to hear about it. Any harassment at all. What you have described is deplorable and unacceptable. We want to know, if because you came here today somehow or other your life back in the VA, where you have served so nobly, is made uncomfortable.

Mr. Kenny, it is rather disturbing that in your examination of six stations, almost 36 of the 329 cases examined had control problems. Tell us a little more about the control problems. Did they result, or could they have resulted, in a lack of due process for the veteran claimant? Was the veteran disadvantaged by these problems that you discovered?

Mr. **Kenny**. I don't know of any case where anyone was denied specifically because of these problems, but I do know that we are supposed to be treating people fairly. If we're not giving the case a proper review, if we're not giving the case a timely review, if we're not processing a case as well as possible, then we are failing the individual.

Mr. **Edwards**. Mr. Abrams or Mr. Boskovich, or Mr. Kenny, you have found various problems in the course of your work. Are they due to a lack of proper regulations or to the lack of enforcement by the VA Central Office?

Mr. **Boskovich**. I would like to give an example that I think will clarify some of the problems which we can visualize what it does to a person and not a statistic.

For example, in one case a veteran's claim was denied twice for failure to provide unnecessary information. The veteran, a former prisoner of war during World War II, was initially requested to provide his service records, when this is generally the responsibility of the VA, and he was requested to provide income statements, although income was irrelevant to his claim. The veteran failed to provide this information in the time allowed and, thus, his claim was disallowed for failure to provide the information.

The veteran eventually provided an income statement, which was not needed, and the claim was denied a second time on the basis of excess income. As far as I know, the person still hasn't had a decision on his claim.

Mr. **Edwards**. Can any of the other witnesses provide the committee with examples of unfortunate circumstances where the procedures of the claims department were inadequate? Mr. Abrams?

Mr. **Abrams**. There are many examples, sir. It is something that you have to see and go to regional offices to understand the depth of the particular problem.

I'll give you one example I found on my trip to the Phoenix office. A veteran filed a claim for compensation for a bilateral leg condition. The claim was not put under prompt control. Eventually, approximately 90 days after the claim came in, someone noticed it and put it under control. Instead of going out for service records, they asked the veteran for continuity of treatment—which is wrong; they shouldn't have done that.

The service records came in and they were placed in the claims folder. At the end of 60 days, or shortly before that, the claim was disallowed for failure to prosecute. No letter was sent.

I looked at that case as part of my quality control check. In it I found that the veteran was in combat and had both legs shot off below the knees, and he was entitled, without any other evidence, to over $1,600 tax free every month. This is a typical example, in the worst case, of the way we can abuse our system in order to take credit and not to protect the rights of our claimants.

Mr. **Edwards**. Thank you, Mr. Abrams.

My time has expired, but I would point out, Mr. Chairman, that these witnesses have many, many examples of a lack of due process and a lot of problems in the system, if they were asked.

The **Chairman**. Thank you, Mr. Edwards.

Before recognizing Mr. Applegate, I would like Mr. Edwards to take the Chair, if he would.

Mr. **Edwards** [presiding]. The committee will come to order.

Mr. Applegate is recognized.

Mr. **Applegate**. Thank you, Mr. Chairman.

Just to take issue a little bit with my very good friend from New York, who I have the greatest respect for, Mr. Solomon—first of all, let me say this. I think that the testimony that I heard here from you gentlemen, to me is very scary, to say the least. But you come here, I think, as very credible witnesses, as employees of the Veterans' Administration. I think you come here with an extremely credible story which hopefully we will be able to utilize in some future hearings, to some degree, that will help to maybe straighten out some of the mess that there is within the VA.

But to what Mr. Solomon said, I think the inference of wrongdoing, which I think was stated in your comments, upon Mr. Abrams' white paper, is something like telling the student they stole somebody else's answers to a test or used somebody else's material. I think that proper credit was given by Mr. Abrams.

But I guess one only has to go back in history. This isn't anything that's new, in using other people's materials. As a matter of fact, the Declaration of Independence was a compilation of many, many thoughts, of many minds, of some of our forefathers used by Thomas Jefferson, in which case Thomas Jefferson gave due credit. But he was credited with writing the Declaration of Independence.

The same goes with one of his successors, President James Madison, who was regarded as the father of the Constitution of this country. What he used was not all of his ideas but a compilation of ideas from many of those who worked with him and who were given credit. So I don't think there's anything wrong with that. I would only congratulate Mr. Abrams for receiving the awards he did for the paper that he wrote.

I am hopeful that what comes out of these hearings will prove to be beneficial in the long run to the people we are trying to serve, the veterans.

Thank you.

Mr. **Edwards**. The time of the gentleman has expired.

Mr. **Abrams**. Thank you, Mr. Applegate.

Mr. **Edwards**. The gentleman from Illinois, Mr. Evans, is recognized.

Mr. **Evans**. Thank you, Mr. Chairman.

I salute this panel for coming forward with the guts that they have, given the circumstances they face—the quiet threats against families, the fright that all this harassment has caused. The use of swastikas reminds me of an imitation of some "Godfather" movie, and a poor one at that. So I appreciate you coming before us.

Mr. Abrams, thank you as well for writing this report, "Due Process and its Application to the Compensation and Pension Program", whoever gets credit. If it's our learned counsel, so be it. But my question is, could you briefly describe the findings and recommendations out of this paper and tell us, more importantly, if any of the recommendations you have made in this paper have been implemented?

Mr. **Abrams**. This paper was written because due process problems were identified within the compensation and pension program. Certain sections of the Code of Federal Regulations and the operating manual were identified for change or elimination. The responsibility of the VA to provide procedural due process, even when acting in an administrative manner, was stressed. The accountability of our local managers for the quality of the work they performed was emphasized.

I recommended that, whenever a claim is filed, the veteran be notified of the right to a hearing. At the present time, if a reopened claim is filed, we do not tell the veteran that he has a right to a hearing until after we make a grant or a denial of benefits.

I asked that section 3.109(b) of title 38 be eliminated. The General Counsel calls this regulation legally objectionable. The regulation states, in essence, that failure by the agency to furnish notice of the time limit for filing a claim or a submission of evidence will not extend the periods allowed for these actions. This means that if the VA fails to live up to what it's supposed to actually do, to notify the veteran of the time limit for filing a claim, the veteran would be held accountable for our failure. This is outrageous. It's wrong and it should be changed.

I also recommended that our managers be held accountable for quality as well as quantity. At the present time, we do not know the quality level in the field. Our statistics show, at least at the time I was working in that area, that the statistics shown by our local offices are not validated in Central Office. In my due process paper, I noted that over 85 percent of the offices we checked did not validate one important area. In fact, 25 percent didn't validate three of the four important areas.

Although other recommendations in my paper were put into effect, none of the examples I cited were implemented.

Mr. EVANS. Mr. Chairman, I think this report is of great interest to this committee and I would ask unanimous consent that it be entered into the record of these proceedings.

Mr. EDWARDS. Without objection, so ordered.

[The report appears at p. 173.]

Mr. EVANS. Mr. Boskovich, were you told by any VA personnel to lie or to be evasive at the Federal court hearings to determine whether the VA had engaged in wrongdoing in answering discovery requests?

Mr. BOSKOVICH. I was certainly not told to lie. If anything, I was told to keep the answers to "yes" or "no", if possible, to try to not give any information away. If I was asked a specific question, I was to answer it.

Mr. EVANS. In January the Justice Department announced that it was investigating whether there was obstruction of justice on how the VA responded to discovery requests. Have you been interviewed by the Justice Department as of yet?

Mr. BOSKOVICH. No, I have not.

Mr. EVANS. Do you know why not?

Mr. BOSKOVICH. No, I do not.

Mr. EVANS. Do you think, Mr. Boskovich, that VA procedures are fair to veterans who apply for benefits?

Mr. BOSKOVICH. I think the procedures are fair in many cases. I do believe, in certain complex cases, that because of interest in productivity many of the procedures are overlooked. I also believe we have a problem that we do not enforce the procedures that we do have.

Many of the due process items have been proposed for years. We look good on the record, but if we don't insist that regional offices follow the rules, then the claimant, I believe, suffers.

Mr. EVANS. I want to thank this panel for the guts they had in coming forward and would let you know that you have a friend at 328 Cannon, in case you suffer any repercussions as a result of your testimony. Thank you very much.

Mr. EDWARDS. Thank you, Mr. Evans.

Before I recognize Mr. Smith, I would like to point out that Senator Cranston will have written questions for these witnesses. He wants to make it very clear that you are all free to respond fully to these questions and do not need a clearance from anybody at the VA, and the VA should not seek, in any manner, to review the responses to the questions that any of us and, in particular, Senator Cranston, will be sending to you.

I now recognize the gentleman from New Hampshire, Mr. Smith.

Mr. SMITH OF NEW HAMPSHIRE. I have no questions at this time, Mr. Chairman.

Mr. EDWARDS. I recognize the gentleman from Texas, Mr. Bryant.

Mr. BRYANT. I would like to ask Mr. Abrams, you heard the question propounded by Mr. Lane Evans a moment ago to Mr. Boskovich, in which he asked, in view of the evidence that apparently records were destroyed and not brought forward when requested for the court, that the Justice Department indicated it was going to begin an investigation on whether or not there had been obstruction of justice. Mr. Boskovich indicated that no one from Justice has ever talked to him.

Has anyone talked to you from the Justice Department?

Mr. ABRAMS. I have talked to the attorney representing the VA in this case. I talked to her yesterday. She told me that she had a copy of the swastika, but she said that her office was not going to take any action, that there was going to be a criminal investigation. I told her no one had contacted me whatsoever about anything, and she said I would have to wait. It's been 3 months.

Mr. BRYANT. In order that the record might read clearly, my question related specifically to those who would be carrying out that criminal investigation, not to a Justice Department lawyer who might be representing the VA. I think you understood that, but I want that to be clear in the record as well.

Mr. ABRAMS. No. No one has——

Mr. BRYANT. You have not heard from anyone from the Justice Department regarding an investigation of obstruction of justice, other than the VA's own lawyer?

Mr. ABRAMS. That is right. No one has contacted me.

Mr. BRYANT. Mr. Kenny, how about you?

Mr. KENNY. Nobody has contacted me, sir.

Mr. BRYANT. Mr. Kenny, you have worked for the VA for a long time and have a broad perspective on how the claims adjudication process is supposed to work. I might ask you a general question: Do you think it provides veterans with a fair and equitable consideration of their claims?

Mr. **Kenny**. What I think is the procedures that we have drawn up do provide the individual with a fair and equitable process. But we have the problem with not enforcing our rules. If we don't enforce the rules, we could write everything from now until the end of the world and it's not going to do a bit of good.

Mr. **Bryant**. What happened to the site visit reports you helped prepare?

Mr. **Kenny**. They were forwarded down to the area field directors who existed at that time. They don't exist any more. They reorganized. And they were forwarded out to the field stations. The field stations were to respond to us within 30 days on any findings we had, and to develop a plan of action to take care of the problem areas that we identified.

Mr. **Bryant**. Was there any follow-up by the VA Central Office?

Mr. **Kenny**. Not that I'm aware of. We did not have any follow-up visits or anything like that. What we came to was a conclusion later on that we noticed, out of our data, that they were having problems putting material under control in a timely basis. We sent out a TWX in May of 1984, which told the field stations that they had to report to us on a mandatory basis why they were not placing material under control.

We formalized that in—I guess it was in January of 1985, with a circular demanding that they—insisting that they write in and tell us why they weren't under controls. We changed that in May or April of 1985, making it that we would request it in by Central Office staff. As I understand now, we are just rescinding it April 1 of this year. I don't know what the results were on people coming in.

Mr. **Bryant**. Thank you. I have no further questions.

Mr. **Edwards**. The gentleman from South Dakota, Mr. Johnson.

Mr. **Johnson**. I just want to congratulate the gentlemen here for the courage they have demonstrated in coming forward and testifying at this committee hearing.

Mr. Abrams, you mentioned in your opening statement that you have performed survey visits. Could you explain again to me what those are and why they're done?

Mr. **Abrams**. Certainly. A survey visit is done to investigate the adjudication operation in a regional office. Different people are sent, each one with an area of expertise. It was my job to look at how claims were handled and whether or not people were treated fairly.

I started off by going to the St. Paul regional office, and I was shocked. The rating boards there were so bad that the adjudication manager called them a festering sore. We looked at cases there and we found out that the rating boards were insensitive and tended to prematurely deny claims. Of course, that did not please anybody, but we noted it on our report.

This is what we said: "Most of these errors involve the denial of benefits based on insufficient supporting evidence, compounded by piecemeal or inadequate development. Also, notification to the claimant, including statements of the case, was inadequate." I'm not sure what was done at that office. I know that we sent in the report.

Mr. **Johnson**. Shifting to another question, are you familiar with a memorandum entitled, "Documentation of Due Process, *NARS* v. *Walters*, Suggested Action"?

Mr. **Abrams**. Yes, I am.

Mr. **Johnson**. And why was that memo prepared, and can you briefly summarize the substance of the memo, as well?

Mr. **Abrams**. Okay. One second, sir.

Shortly after giving a deposition in the *NARS* case, the Director of the Compensation and Pension Service met with me. He stated that he considered me the due process expert for the Compensation and Pension Service. He stated that he needed to fully understand the legal issues in the *NARS* case. He stated that he would like to see the memo that I wrote dealing with issues pertinent to the *NARS* case, which was torn up by Mr. Dunlap, who is the head of Field Operations for the Compensation and Pension Service.

I sent this memo through Mr. Dunlap to the Director in April, 1985, and it dealt with enforcement of due process. It was torn up because Dunlap read it and he was so mad that he just tore the envelope and everything else in it and threw it in the trash. Mr. Moore agreed that I would prepare another memo dealing with these issues, and I would also propose certain actions. I also told him I would send him a copy of the April 5, 1985 memo that Dunlap did not let him see.

The substance of this memo was to provide the Director of the Compensation and Pension Service with what I thought would be the arguments that the plaintiffs' attorney would present. I knew what information I had to send in as a result of *NARS*, and I felt I had a good idea of the direction that the plaintiffs' attorney would take.

Mr. **Johnson**. I wonder if we could have that memo submitted for the hearing record.

Mr. **Abrams**. I'm certain that Mr. Moore has it. I'm not sure if I'm allowed to give it from my private papers. I think there might be an agency rule on that.

Mr. **Edwards**. Without objection, the memo will be made available for the record. We know where it is.

[The memo appears at p. 252.]

Mr. **Johnson**. Thank you, Mr. Chairman.

At the end of the memo you indicated that you wanted that memo to remain confidential. Would you elaborate on why that was and how do you know that the document did become public?

Mr. **Abrams**. Okay. First of all, I called for administrative action, which is a thinly veiled statement saying that someone should be fired, against supervisors who knowingly permitted the gross violation of the constitutional rights of veterans. Mr. Dunlap is the Assistant Director in Section 214. I didn't want him to see this because he might think it was an attack against him.

Obviously, the plaintiffs' attorney would be interested in this, but it came to public notice when the Justice Department attorney, in the testimony given in the *NARS* case, asked me some actual questions about it and I had to bring it up then. It is possible that the Justice Department, representing the VA in this matter, had an interest in making it public. I don't know.

Mr. **Johnson**. Thank you, Mr. Abrams.

Thank you, Mr. Chairman.

Mr. **Edwards**. Are there questions from staff from the Senate? Mr. Steinberg?

Mr. **Steinberg**. No questions, Mr. Chairman.

Mr. **Edwards**. Are there questions from staff from the House side?

Mr. **Wilson**. No, Mr. Chairman.

Mr. **Edwards**. Well, are there questions from any other Members or any Members who previously questioned these witnesses? If not, we thank you very much for coming here today. You have given valuable testimony and we appreciate it very much.

Mr. **Boskovich**. Thank you.

Mr. **Edwards**. Our next witness is a Veterans' Administration employee. We welcome Mr. Michael A. Dunlap. Mr. Dunlap, your full statement will be made a part of the record.

Mr. Dunlap, we welcome you. Will you introduce your colleague, and you may proceed.

STATEMENT OF MICHAEL A. DUNLAP, VETERANS' ADMINISTRATION EMPLOYEE; ACCOMPANIED BY PETER BROIDA, ESQ., COUNSEL

Mr. **Dunlap**. Yes, sir. My name is Michael Dunlap. I am accompanied by my attorney, Mr. Broida, who is here to assist me in making my presentation.

I don't have a prepared statement, but based on the foregoing, I have a couple of remarks that I would like to have entered in the record, sir.

First of all, I would like to say that I, and other employees of the Veterans' Administration, are proud to serve the VA, the veterans, and their survivors. Our mission as employees is to assure, not defeat, veterans' entitlements.

It is impossible, in the context of this hearing, to go through the amount of detail required to explain the processing of the litigation which is in control of the Justice Department and VA litigation lawyers.

I was involved in no improper document destructions. Documents are routinely destroyed in an organization that is dependent on paperwork, as is the Veterans' Administration.

There were no reprisals taken against any VA employees, to my knowledge. They may believe, of course, that they cannot get advancement within the system as rapidly as possible. They have available to them the processes of the Office of Special Counsel and the VA Inspector General. They also have the offer of the Federal district judge in this matter. There is, in the context of personnel administration, a big difference between allegations of employees and the fact of reprisal.

As a private citizen, I am fully in agreement with Senator Cranston's recommendation for a GAO investigation into this matter.

I would also like to say that I was in no way involved in any harassment of the individuals which preceded me in testimony.

I would also like to say that—some allegations were made about individual claims. I would like to state for the record that in the last fiscal year over 3,600,000 issues in the compensation and pension area were adjudicated in the Veterans' Administration. Certainly there are going to be some horror stories that come to light, and I think an implication of the fact that we find these problems is that the system works and not that it doesn't work.

That's all I have, sir.

Mr. EVANS [presiding]. Thank you, Mr. Dunlap.

Mr. Dunlap, are you a lawyer?

Mr. DUNLAP. No, sir.

Mr. EVANS. Mr. Dunlap, in San Francisco you testified that you ripped up a memo that Mr. Abrams had written to Mr. Moore, the Director of the Compensation and Pension Service, which gave legal advice on what steps were necessary to comply with an opinion by a Federal judge in Illinois.

What made you think you were qualified to decide to shred Mr. Abrams' legal advice to your Director?

Mr. DUNLAP. Sir, it is my understanding that I don't believe this was legal advice that he was submitting to the Director of the Service. What Mr. Abrams——

Mr. EVANS. Mr. Abrams is a legal consultant, is he not, to the Veterans' Administration——

Mr. DUNLAP. Yes, sir, as am I.

Mr. EVANS [continuing]. To the Central Office of the Veterans' Administration?

Mr. DUNLAP. Yes, sir.

Mr. EVANS. What would he be writing if it wasn't legal advice?

Mr. DUNLAP. Sir, he wrote his own opinion of the way he thought that certain types of quality review errors should be classified.

Mr. EVANS. Well, Mr. Abrams is a lawyer, is he not?

Mr. DUNLAP. Yes, sir.

Mr. EVANS. Well, then, why would you be making the determination on whether this was legal advice or not, going against a legal consultant and a lawyer?

Mr. DUNLAP. Sir, I don't believe that all advice that comes from a lawyer is legal advice. I did not believe at the time that this was destroyed that it was legal advice. To be honest with you, in retrospect, with what has happened, if I had an opportunity today, the same opportunity as I had then, I would not have destroyed the document.

Mr. EVANS. Well, this is, of course, from a person that has written a memo, that has won a VA bonus award—granted, not the same one you ripped up——

Mr. DUNLAP. No, sir.

Mr. EVANS [continuing]. But one that was widely distributed. It is just shocking to me that that would be destroyed in such a manner.

In January, the judge in the San Francisco case found that your testimony was "inherently incredible". Do you think that the judge's opinion in this matter might have something to do with your denying, in your testimony of December 3, that you had never seen any reports on problems in due process, and then on December 5, saying that you tore up one paper which clearly reported on problems in due process and reviewed another?

Mr. DUNLAP. Sir, I don't know what went into the judge's opinion that she rendered in her decision, but I will state for the record that, with respect to Mr. Abrams' due process paper, which you have admitted into evidence, the multi-paged document, that this was submitted after the paper that I destroyed, and I have also joined with other supervisors in the agency in commending him for it. As a matter of fact, this latter paper was submitted through me and I believe that, in the course of reviewing it, hopefully I submitted some improvements to the paper incorporated in the final version of it.

Mr. EVANS. I understand that while you were assistant adjudication officer at the Washington regional office, the VA Central Office made some very negative reports concerning that operation. Is that true?

Mr. DUNLAP. Yes, sir.

Mr. EVANS. All right. Who were the adjudication officers that you worked under at the Washington regional office?

Mr. DUNLAP. I worked under one, sir. His name was Lawrence Wheeler.

Mr. EVANS. Mr. Wheeler?

Mr. DUNLAP. Yes, sir.

Mr. EVANS. I have run out of questions. I would yield to the staff counsel of the minority for a matter.

Mr. WILSON. Mr. Dunlap, I think you started to talk about legal consultants and what their qualifications are, and I think you started to say that they do not necessarily have to be lawyers. Would you elaborate on that, please?

Mr. DUNLAP. Yes, sir. There is absolutely no requirement that legal consultants in the Compensation and Pension Service be lawyers. There are, however, a number of them on the staff beyond Mr. Abrams. As a matter of fact, Mr. Mars, who is my immediate supervisor, is himself a lawyer. Mr. Spindle and Mr. Hickman, who have both been mentioned here today, they are both lawyers. And there are others beyond them.

Mr. EVANS. The gentleman from California is recognized.

Mr. EDWARDS. Thank you, Mr. Chairman.

We welcome you, Mr. Dunlap. You say that this destruction of records was just a routine housecleaning; is that your testimony?

Mr. DUNLAP. Yes, sir, that's correct.

Mr. EDWARDS. When was the last one? Was it not 20 years ago?

Mr. DUNLAP. No, sir.

Mr. EDWARDS. When was it?

Mr. DUNLAP. I believe—I wasn't there during the last one, but I believe Mr. Kenny, during his testimony in San Francisco, said that he was involved in going through these records in 1982. I will also say, sir, that the dates during which this destruction began occurred during a period of my absence from my office. At the time, under no knowledge at all that any of these records could be required in the *NARS* lawsuit. None of the records we got rid of had anything to do with claims; none of these records, to my knowledge, had anything to do with radiation.

Mr. EDWARDS. Well, you disagree with the judge, then. You think the judge made an erroneous finding?

Mr. DUNLAP. I can't say why the judge made that. I can suggest that perhaps it may have something to do with what's been indicated earlier, that the Assistant U.S. Attorney in San Francisco made a statement that, without having seen the records, that they were pertinent.

Mr. EDWARDS. But you disagree with the judge. You think the judge made a wrong finding?

Mr. DUNLAP. Yes, sir, I do.

Mr. EDWARDS. All right.

Now, you're a supervisor, Mr. Dunlap. Three other supervisors—Mr. Wheeler, Mr. Yurgal and another—were invited. Why didn't they come?

Mr. DUNLAP. I couldn't answer that, sir. I don't know.

Mr. EDWARDS. Why would you come and they not? Were they told by their superiors not to come? There must be some office information about that.

Mr. DUNLAP. Sir, I can only extrapolate from my own experience. I was not told anything by any of my supervisors. They were very scrupulous in not encouraging or discouraging me. They said it's a private decision that I would have to make.

Frankly, sir, I am happy to be here. At this time I am under orders of my supervisors not to talk to the press. Frankly, it is somewhat uncomfortable for me to see my name bandied about in the press and allegations made about me and what I did or didn't do. As far as I'm concerned, sir, this forum is an opportunity for me to express my side, and it is welcomed.

Mr. EDWARDS. We appreciate that. Thank you.

Thank you, Mr. Chairman.

Mr. EVANS. Thank you.

The gentleman from Texas.

Mr. BRYANT. Thank you, Mr. Chairman.

I would like to make a parliamentary inquiry. Are these witnesses sworn?

Mr. EVANS. No, they're not sworn.

Mr. BRYANT. Do the rules of this committee require that witnesses in an investigation like this be sworn?

Mr. EVANS. No.

Mr. BRYANT. Is the committee empowered to vote that we swear each witness?

Mr. EVANS. I would have to defer to counsel.

Mr. RYAN. Mr. Bryant, I think I would have to check on that. I think it would be up to the chairman, but I would have to double-check that.

Mr. BRYANT. Well, inasmuch as most of the committee members aren't here, I won't press it further. I find it unusual that we're conducting a serious investigation and we don't have an oath preceding the testimony of the witnesses. But I will leave that to——

Mr. EVANS. I think the gentleman knows that generally we expect the witnesses to be truthful and responsible in their testimony before us. I would say if, in fact, the facts show that they are not, that would be of great interest to our chairman and myself as the chairman of the Subcommittee on Oversight and Investigations. It might prompt us to move to a sworn testimony procedure in the future.

I now will yield 5 minutes to the gentleman from Texas.

Mr. DUNLAP. Excuse me, sir. If it will help these proceedings, I would like to volunteer to take an oath, if that would——

Mr. **Bryant**. I would volunteer to administer one, but I don't think I have the authority to do that.

[Laughter.]

Mr. **Evans**. I don't think that's appropriate. I appreciate the gentleman's willingness, but we have not had that kind of procedure so far yet in my experience on the committee and I would not want to make any kind of precedent without knowing what the implications would be.

Mr. **Bryant**. Mr. Dunlap, do you know Gary Hickman and Carol Wheeler and Robert Yurgal?

Mr. **Dunlap**. Yes, sir.

Mr. **Bryant**. Do you know why they're not here today?

Mr. **Dunlap**. No, sir, I don't.

Mr. **Bryant**. Have you talked about the fact that they're not going to be here with anyone?

Mr. **Dunlap**. I talked to them about it, but none of the three went into any detail as to why they were going to be here or not going to be here. It was just mentioned in passing, no, they're not, they weren't going to be here.

Mr. **Bryant**. Why did they say they weren't going to be here?

Mr. **Dunlap**. I couldn't answer that question, sir. I don't know. I can state that perhaps it may have something to do with the fact that, as they were invited over here as private citizens, that they felt somewhat uncomfortable in that role, as the only testimony which they would have to submit would be about the agency for which they work.

Mr. **Bryant**. And why do you arrive at that conclusion?

Mr. **Dunlap**. Because I share that, sir.

Mr. **Bryant**. I mean, did you discuss that with them?

Mr. **Dunlap**. No, sir.

Mr. **Bryant**. Did you see them? Have they uttered to you the word "no", affirming that they were not going to be here?

Mr. **Dunlap**. I believe so; sir, yes.

Mr. **Bryant**. Okay. What did you say? "Are you going to be here?", and they said "no."

Mr. **Dunlap**. Words to that effect; sir, yes.

Mr. **Bryant**. And there was no follow-up to that "no"?

Mr. **Dunlap**. No, sir.

Mr. **Bryant**. None?

Mr. **Dunlap**. By me? No, sir.

Mr. **Bryant**. What preceded your question?

Mr. **Dunlap**. What preceded——

Mr. **Bryant**. You understand that's not a normal human conversation you just described.

Mr. **Dunlap**. I understand your point, sir. I believe that, for the reasons that went before, perhaps I understood their reluctance to come and testify under the conditions that are present in this hearing today.

Mr. **Bryant**. Well, I'm asking you to tell us exactly what they said.

Let's start with Mr. Hickman. What did he say to you? Where did you encounter him about this matter and what did he say to you?

Mr. DUNLAP. Our discussion on it was very brief, sir. The only thing that I recall him saying is that he was not going to appear.

Mr. BRYANT. Where did that discussion take place?

Mr. DUNLAP. I believe it was in his office. It may have been in passing. I may have been in there asking some questions of somebody. I don't recall precisely.

Mr. BRYANT. It's just kind of a routine deal, that you're coming down to testify before the Veterans' Affairs Committee about an obstruction of justice allegation against the Veterans' Administration, and you don't discuss it any more than just to hear him say no, he isn't coming?

Mr. DUNLAP. Sir, the—for one thing, I didn't get my invitation until much later than the other individuals, and since I was not going to be here, I didn't get involved to the point where I was concerned about who was coming until later on in the process.

My invitation from Senator Cranston was dated March 9th, and I didn't get it until the following day, and the following day after that I was going to go on a 2-day trip to Pittsburgh. Consequently, I didn't get a chance to see them very much to talk about this issue, sir.

Mr. BRYANT. Well, fine. But you apparently were in the office talking about the issue, and they said no, they weren't coming, right?

Mr. DUNLAP. That's correct, sir.

Mr. BRYANT. I'm just asserting that it seems not to be very credible that the conversation would end with a very simple "no".

Mr. DUNLAP. Well, that's the essence of it. As we discuss this, I do have some of my memory sharpened somewhat with respect to Mrs. Wheeler. She was not back and didn't come to work until yesterday, so her first—she would have been on a cruise for several weeks before that. The first time she was aware of this invitation was yesterday morning, and I was in her office when she talked to Mr. Ryan and explained to him that she would not be coming to testify this morning.

Mr. BRYANT. And what did she say her reasons were?

Mr. DUNLAP. I don't recall, sir.

Mr. BRYANT. You're really straining, I think, our courtesy to you, for you to say you recall her saying no, but you don't recall what her reasons were.

Mr. DUNLAP. Well, sir, to be honest with you, I was not listening carefully to what she was saying on the phone. I'm not in the habit of doing that.

Mr. BRYANT. My time is apparently up.

Mr. EVANS. Thank you.

I would like to go through another question, Mr. Dunlap.

Mr. Dunlap, the judge also found that you had "general hostility to issues of due process." Do you think that the judge's opinion here might be based on your tearing up of papers on the subject and denying papers that show problems in the due process when they clearly did, and your editing of site surveys to soften criticism of regional offices?

Mr. DUNLAP. Sir, I agree that problems exist. Whether or not those problems are a specific manifestation of a problem with due process is not for me to say. My position, as a second level supervisor of staffs that are required to enforce procedures in the field, is not to make decisions on what constitutes a due process violation or not. Sir, as far as I'm concerned, that is a decision to be made by attorneys that are much more learned in the law than I.

Mr. EVANS. That's interesting, because we have been going through some efforts to ascertain if you're a lawyer or not, and now you're admitting, I guess, that you don't have as much legal competence as a lawyer does to decide on matters of due process?

Mr. DUNLAP. I would say I would agree with that, yes, sir.

Mr. EVANS. Are you at least upset by the judge's description of your general hostilities to the issue of due process or other——

Mr. DUNLAP. Yes, sir.

Mr. EVANS [continuing]. Or other statements about the inherent incredibility of your statements in the court?

Mr. DUNLAP. Yes, sir, I am.

Mr. EVANS. I hope so.

I would yield at this time to Mr. Wilson, the minority counsel.

Mr. WILSON. Mr. Dunlap, I think you cleared the matter up about Mrs. Wheeler. Would you please repeat that for the record, that she did not get notice of this hearing until when?

Mr. DUNLAP. Until yesterday morning, sir, when she reported for work on Monday. As far as I'm aware, that's the first time she was aware of the hearing.

Mr. WILSON. I really don't want to get into court matters, Mr. Dunlap, but you were a witness in the California case, were you not?

Mr. DUNLAP. Yes, sir.

Mr. WILSON. Did it appear to be a hostile kind of a hearing?

Mr. DUNLAP. Yes, sir.

Mr. WILSON. In what manner? Would you elaborate on that, please?

Mr. DUNLAP. Sir——

Mr. WILSON. Mr. Dunlap, I don't think that's really a fair question. I'll withdraw it.

Mr. DUNLAP. Thank you.

[Laughter.]

Mr. EVANS. The minority or majority counsel of the Senate, do you have any questions?

Mr. STEINBERG. Mr. Dunlap, at some point did you become aware of the May 29 so-called "deep throat" letter?

Mr. DUNLAP. Yes, sir.

Mr. STEINBERG. When was that?

Mr. DUNLAP. I believe it was some time in July of 1985—No, excuse me, July of 1986. I'm sorry, yes.

Mr. STEINBERG. Is it correct that between June 11 and June 13 that both you and—is it Mr. Nored?

Mr. DUNLAP. Miss Norred.

Mr. STEINBERG. Miss Nored were out of the office?

Mr. DUNLAP. Yes, sir, that's correct.

Mr. STEINBERG. And did the destruction of documents begin during that period of time?

Mr. DUNLAP. Yes, sir.

Mr. STEINBERG. And when did you return to the office?

Mr. **Dunlap**. I returned on the Monday following the 13th, whatever that was. I believe the 13th was a Friday, so I believe——

Mr. **Steinberg**. Would it be the 16th, then?

Mr. **Dunlap**. The 16th, I believe that's the date I returned.

Mr. **Steinberg**. And did you at that point learn that the destruction of these files was going on by—again, is it Mr. Tomasek, Mr. Bissel, and Mr. Zinn?

Mr. **Dunlap**. Yes, sir. At that time there was—these individuals were paging through these operating files, and they were removing old, outdated material.

Mr. **Steinberg**. And that's when you learned of that?

Mr. **Dunlap**. Yes, sir.

Mr. **Steinberg**. Had you been aware prior to that point, or were you aware at that point, on June 16, that this case was pending——

Mr. **Dunlap**. Yes, sir, I was aware of it.

Mr. **Steinberg**. And were you aware that the plaintiffs' were seeking discovery of VA documents?

Mr. **Dunlap**. I was aware, in general, they were seeking discovery of VA documents. I presumed that those documents had to do with radiation and, to my knowledge, none of the documents which were gleaned from the operating files and destroyed had to do with radiation.

Mr. **Steinberg**. At what point did you become aware that the plaintiffs' discovery request extended beyond radiation files?

Mr. **Dunlap**. I believe at some point after I returned from my leave, which ended on the 7th of July, and after the judge issued—or after I became aware of the judge's protective order, which I believe I became aware of on July 21.

Mr. **Steinberg**. The judge's order, I believe, was July 18.

Mr. **Dunlap**. Yes, sir, but I believe that's a Friday.

Mr. **Steinberg**. So you're saying you did not become aware that the plaintiffs were seeking discovery beyond radiation documents until after July 18, until after the court entered that order?

Mr. **Dunlap**. Yes. I was only aware that they were seeking discovery of documents that I had at that time, yes, sir.

As a matter of fact, there was—you see, there were two different destructions that were planned. One destruction in the Field Operations Staff was begun in early June and was completed after just a couple of days. It was begun when I wasn't there and was completed when I was back at the office. The other destruction was done by another one of the staffs that I supervise indirectly, and that staff had in their records some files relating to radiation development. That destruction was——

Mr. **Steinberg**. Was that Mr. Kurtz?

Mr. **Dunlap**. Yes, sir. That preparation for destruction was occurring at the time that we got notice of the judge's protective order, and at the time we just assumed these were the documents which were requested and these documents were immediately secured and locked up in Mr. Kurtz' office to protect them.

Mr. **Steinberg**. Were those documents that were marked "trash"?

Mr. **Dunlap**. I'm not aware of them being marked as "trash", sir. I just know that on the day I got notice of the protective order, that morning the consultants that work for Mr. Kurtz were going through his files and they were pulling out all the metal out of these files—all the Acco fasteners, paper clips and the like—preliminary to turning them over to our Administrative Services staff in our Central Office for destruction.

Mr. **Steinberg**. Did you have a conversation with Mr. Moore at that time, who was in Reno, NV, with respect to this discovery process?

Mr. **Dunlap**. Yes, sir.

Mr. **Steinberg**. Could you tell us about that, please?

Mr. **Dunlap**. Yes, sir. I believe Mr. Moore was attending the DAV national convention in Reno, and I got notice of the protective order over the phone from him. It was in his office with, I believe, Mr. Mars in attendance, and there might have been somebody else. I don't recall.

Mr. **Steinberg**. Did he initiate that call?

Mr. **Dunlap**. Yes, sir.

Mr. **Steinberg**. And that was in order to advise you about the protective order?

Mr. **Dunlap**. Yes, sir.

Mr. **Steinberg**. And what did he say you should do with respect to that?

Mr. **Dunlap**. Destroy absolutely nothing. And that's exactly what we did.

Mr. **Steinberg**. Thank you, Mr. Chairman.

Mr. **Edwards** [presiding]. Are there any other questions?

Mr. **Wilson**. Mr. Chairman, could we just have Mr. Dunlap's background in the Veterans' Administration, please?

Mr. **Edwards**. Without objection, so ordered.

Mr. **Dunlap**. Sir, I began with the Veterans' Administration in——

Mr. **Wilson**. Just for the record, Mr. Dunlap.

Mr. **Dunlap**. Okay.

[The information appears at p. 258.]

Mr. **Edwards**. Thank you very much. I believe there are no more questions, Mr. Dunlap.

Mr. **Steinberg**. Mr. Edwards, could I pose one more question?

Mr. **Edwards**. Yes, of course, Mr. Steinberg.

Mr. **Steinberg**. Thank you very much.

Mr. Dunlap, at any point did any employee of the Veterans' Administration—Mr. Boskovich, Mr. Kenny, Mr. Abrams, Mr. Nicholson, or any of those who were engaged in the destruction of documents—raise any questions to you or in your presence about the appropriateness of the destruction in connection with the discovery process which was then ongoing?

Mr. **Dunlap**. No, sir.

Mr. **Steinberg**. Thank you.

Mr. **Edwards**. Were there any meetings that took place amongst the supervisors about the lawsuit and about the documents and so forth?

Mr. **Dunlap**. I don't recall any, sir. There were——

Mr. **Edwards**. If there were meetings, I'm sure you would have remembered attending.

Mr. DUNLAP. Well, sir, there were instances where Mr. Hickman's subordinate contacted me and they would decide which part of the Service would respond to individual requests, under requests for discovery. In that conjunction, things were referred to me and I did talk to Mrs. Orr on several instances, but they weren't formal meetings, no.

Mr. EDWARDS. Thank you very much, Mr. Dunlap.

Mr. DUNLAP. You're welcome.

Mr. EDWARDS. Before moving on to the next two witnesses, without objection, I would like to insert into the record at this point the refusal letters of Mr. Hickman, Mr. Yurgal, and Ms. Wheeler, who wrote to Chairman Montgomery and declined to appear at this hearing.

[The letters appear at pp. 259–261:]

Mr. EDWARDS. The last two witnesses that we welcome today represent the Veterans' Administration, our old friend, Mr. Donald Ivers, General Counsel, and Mr. R. J. Vogel, Chief Benefits Director. I believe that Mr. Ivers will testify. Without objection, your full statement will be made a part of the record and you may proceed.

STATEMENTS OF DONALD IVERS, GENERAL COUNSEL, VETERANS' ADMINISTRATION; AND R. J. VOGEL, CHIEF BENEFITS DIRECTOR, VETERANS' ADMINISTRATION; ACCOMPANIED BY DON ZEGLIN, DEPUTY ASSISTANT GENERAL COUNSEL, VETERANS' ADMINISTRATION

STATEMENT OF DONALD IVERS

Mr. IVERS. Thank you, Mr. Chairman.

Before I begin, if I might, I would ask that at the conclusion of my remarks if Mr. Vogel would be permitted to make a brief opening statement dealing with his segment of the issue before the committee today.

Mr. EDWARDS. Yes, you may. And will you identify the gentleman on your right?

Mr. IVERS. Yes, I will, sir. With me today at the table, of course, is Mr. Vogel, on my left, the Director of the Department of Veterans Benefits, and on my right is Mr. Don Zeglin, Deputy Assistant General Counsel, and one who has been involved in the discovery process with the VA for a longer period of time than I.

Mr. Chairman, members of the committee, and staff, I would like to say that I'm proud to appear here today on behalf of the Veterans' Administration. I have already introduced those here at the table wth me and ask the chairman that my prepared testimony be submitted in full for the record.

As an attorney, sir, and as a litigator by training and experience, I find myself in total agreement with the Department of Justice, as they have stated in their letter of March 13 declining to testify. The VA, however, does not feel that it has the option to decline to testify in light of the oversight responsibility and authority of these committees and our responsibility to them.

While we are here, and before questions begin, I would like an opportunity to further emphasize several points derived from information made public prior to this hearing and during this hearing.

First of all, I would like to reemphasize that this matter is in litigation before the Federal district court for the Nothern District of California. It is in an early pretrial stage. We are in the middle of the discovery process, a normal, accepted process under the Federal rules. That process allows both parties to obtain full and adequate and lawful disclosure under the rules of the court of those aspects of the other party's case that are available to it. It provides for full disclosure, and we at the Veterans' Administration are now fully committed to providing that full disclosure to the plaintiffs pursuant to their requests.

This agency, as I have said, is a litigant in that matter. We are a litigant in a matter that involves a single issue— that is, the issue of the constitutionality of the application of the $10 attorney fee limit to the plaintiffs in the *NARS* litigation. That's the issue.

There has been no final decision rendered by the court in this matter, or any aspect of this matter. That court has fully reviewed the actions of the Veterans' Administration in connection with the ongoing discovery in this case, has made its findings in that regard, and has, in fact, levied penalties against the Veterans' Administration.

We at the Veterans' Administration fully acknowledge that there were errors made in the discovery process early on in this case. We have, in the course of this proceeding before the court, paid the penalties imposed by the court as a result of those errors. We are now, as I indicated before, fully committed and fully involved in preparing this litigation for trial, which is scheduled for September, and in providing documentation and response to plaintiffs' discovery requests and in preparing and conducting our own half of the discovery process.

Mr. Evans, in a press conference yesterday, expressed shock and disturbance at the court's findings of harassment. Perhaps Mr. Evans would be even more shocked if he were aware that the court has made no such finding. The court directed that allegations of harassment be referred to the Department of Justice for criminal investigation and that has been done. I have been in contact with the Criminal Division at the Department of Justice and they have advised me that they have reviewed the matter and referred it to the Federal Bureau of Investigation for further investigation. Our representatives of our Office of Inspector General have contacted the Federal Bureau of Investigation to offer whatever assistance they may have and were advised that the Federal Bureau of Investigation would contact them when they reached the point at which they could begin that investigation.

[Subsequently, the Veterans Administration submitted the following clarifying information:]

"During the week of April 6, 1987, we were made aware that the FBI's investigation of the harassment allegations had actually commenced."

Mr. **Ivers**. I firmly believe, sir, that these committees are lending themselves to furtherance of a campaign of sensationalism and misinformation by holding these public hearings before the court has properly decided all of the matters before it, and particularly those matters that this committee was convened to look into. I would offer one example of why I'm concerned about that based on the testimony offered here today.

Mr. Erspamer states, at page 19 of his statement, that the VA's own analysis shows that 30 to 50 percent of all claims are complex, citing a memo prepared by Mr. Abrams, a witness here today. Mr. Abrams, in his memo, at paragraph 13, merely stated "I believe Mr. Erspamer will argue that 30 to 50 percent of compensation and pension claims are complex."

Mr. Chairman, of course he will argue that. He did it here today. What we're concerned with, in connection with the *NARS* litigation and in connection with that issue, is whether or not Mr. Erspamer will be able, at the conclusion of his preparation for trial, to prove that allegation in court.

We ask again, as I have in my prepared testimony, that the committees allow the judicial process to be completed and, in the meantime, that the members and their staffs keep the issues here in the proper perspective and not continue to follow the path of sensationalism and misinformation that has been entered into here today.

I thank you, Mr. Chairman, for your time. I stand ready to answer any questions that may be asked. I again request that Mr. Vogel be permitted to offer a statement.

[The prepared statement of Mr. Ivers appears at p. 262.]

Mr. EDWARDS. Mr. Vogel, we welcome you.

STATEMENT OF R. J. VOGEL

Mr. VOGEL. Thank you, Mr. Chairman.

A great deal has been said about the quality, the dedication of the VA's claims processing procedure. A great deal has been left undefined. I would like to walk through just a little bit about some of the management actions that we take to assure that the claims are controlled as they are adjudicated. If there is an adjudicated outcome that, if it's not favorable, is appealable, that hearings may be held at any time during the process.

I think the panel just before Mr. Dunlap, one of the gentlemen spoke about cases being put into control. I want to tell you what control is and what a record purpose disallowance is, and then I will respond to any questions you or the members may have.

When a claim is received, a clerk, a clerical employee, puts the case under a control to see to it literally that the case does not fall through the cracks. That's called CESTing, C-E-S-T, a claims establishment. It's a little esoteric, but I ask you to bear with me.

They put that under control to see to it that the adjudication action is taken. It then goes into the claims examination process where evidence is requested from the military, from the VA medical center, from other VA medical centers, from a facility, public documents, wherever. If the claim is not adjudicated, that same system will generate a diary notification that the claim is still pending. In cases where a veteran claimant has the burden placed upon them—I hate to use the word burden—but it's incumbent upon them to supply information so the claim can be adjudicated. I'm thinking of a simple case where a veteran writes us and says "VA, I am being paid as a single veteran. I have a dependent spouse." We write a letter and we ask they provide evidence of that dependency. There's a pending claim then in the system. When we notify them 60 days later, approximately, a diary comes up and the VA has not heard from the veteran. We now have a procedure of writing to him and saying: "We wrote to you about 60 days ago, we told you you needed to send us this information, and we can't do anything with your claim until you send it in."

That is what's called a records purpose disallowance. What they're doing is not prejudicing the veteran's right to pursue their claims. It is only disposing of a pending issue, which is a computer-assisted diary system. I would like to have that understood by all parties.

We have also spoken about the large number of claims. Mr. Erspamer indicated something like 80 percent of the claims in a certain regional office were administratively disallowed for failure to prosecute. We usually have some 200 or 300 cases in the VA Central Office upon which we do statistical quality checks. We looked at those cases. There're 288 cases in the C&P Service right now. Two of them have a record purpose disallowance in the record, and in neither of those cases was the veteran's claim prejudiced.

We also talked about complex cases. Some cases are scientifically complex. The issues about the origins of various disabilities, the causative factors, are complex. When claims are presented to the Veterans' Administration, those issues have been determined by scientific and other bodies and we have rating board physicians that work on those cases to assist in the proper adjudication.

Post-traumatic stress disorder was cited as a very complex sort of a case. I can tell you that for a 1½ year period, June of 1985 to January of 1987, there were approximately 15,000 claims of service-connection for post-traumatic stress disorder. Approximately 8,100, or 53 percent, were granted service-connection. It's a complex issue, but the procedures are in place and the laws are in place, and the VA does it with heart. I think that bears it out.

I would be pleased to answer any questions you might have, Mr. Chairman.

Mr. **Edwards**. Thank you very much, Mr. Vogel.

Mr. Ivers, the Justice Department plans to spend approximately $1,250,000 in fighting the *NARS* case, according to their budget that they have submitted. How much has the VA itself budgeted for this case?

Mr. **Ivers**. We have agreed to pay the charge—well, we have agreed to pay an equal amount in connection with the preparation of this matter for trial, because of the extensive amount of documentation that's being required. That is, the expenses on our behalf are a contract in order to enter into trial preparation.

Mr. **Edwards**. So in fighting the *NARS* case, the taxpayers are going to pay about $2.5 million, right?

Mr. **Ivers**. I would say that's a conservative estimate, sir, before the case is over.

Mr. **Edwards**. Without objection, we will insert in the record at this point the Department of Justice memorandum, dated January 7, 1987, that has in it the Justice Department's proposed budget.

[The memo appears at p. 277.]

Mr. Ivers. I would like to say, Mr. Chairman, I'm not clear whether or not that $1.2 million that was cited by the Justice Department is $1.2 million on their behalf or the $1.2 million that the VA has agreed to pay for trial preparation.

Mr. Edwards. Mr. Ivers or Mr. Vogel, the court found a reckless disregard of legal processes by VA employees. What disciplinary actions, if any, have been taken against those in charge of complying with the discovery requests in the *NARS* case?

Mr. Ivers. If I may, Mr. Chairman, I would like to respond by saying that we have taken no disciplinary action in regard to any activities in connection with the discovery. The steps that we have taken are to take full management control of the discovery process. As I indicated earlier, we have acknowledged that there were mistakes made. My personal belief is that the discovery process was poorly managed early on. I believe those days are behind us and I believe the discovery process is fully under control.

Any actions to be taken by the Veterans' Administration with respect to the management of the discovery process, or any other aspect of this case, will be addressed fully and have been directed to be addressed fully by the Administrator once we feel we are ready for trial and have this matter suitably behind us, so that we can concentrate on that.

Mr. Edwards. Do you have problems with some of the actions by some of the employees where discipline might be appropriate, or do you just describe them as mistakes?

Mr. Ivers. Right now, sir, I'm going to describe them as management errors, as far as the discovery process is concerned. Even the court has not found any intentional or willful misconduct on the part of any of those employees.

Mr. Edwards. Another document that I submit for the record is by Dorothy Starbuck, former Chief Benefits Director, which shows that as far back as 1975 the Government predicted that 25 percent of all atomic veterans would die of cancer, and estimated that 40,000 of the 250,000 atomic veterans were already dead of cancer.

How do you respond to that, Mr. Ivers?

Mr. Ivers. Mr. Chairman, I am not totally familiar with the context out of which that statement was taken, nor am I totally familiar with the statistics. I have been advised that in his statement, Mr. Erspamer drew some unwarranted inferences by comparing two different sets of statistics.

[Subsequently, the Veterans Administration submitted the following clarifying information:]

The memorandum, dated August 24, 1979, did not predict that 25 percent of atomic veterans would die of cancer but rather only that that number would eventually contract cancer. Further, it contained the estimate that 20,000 were already deceased, not 40,000.

At pp. 11 and 12 of his prepared testimony, Mr. Erspamer drew some totally unwarranted conclusions from the memorandum, which was signed by the former Chief Benefits Director. Nowhere did VA "admit" that 75% of all cancer deaths among atomic veterans were radiation related. The memorandum was prepared by someone who has since retired from the VA, and there is no backup material to show how any statistical analysis was done. We contacted the individual, who is an attorney by training and not a statistician, and he indicated that as best as he can recall the 25% cancer rate figure was simply derived by him from National Cancer Institute statistics regarding lifetime cancer incidences among the U.S. population at large. He made no effort to estimate whether there would be any additional cancers by reason of the atomic veterans' exposure to radiation. The statistical presentation is obviously very crude (for example, 25% of 250,000 is 62,500, not 65,200 as shown), and the 40,000 and 20,000 figures appear to be nothing more than surmises.

Obviously, because no attempt was made to predict excess cancers among atomic veterans, it is fallacious to purport to draw any such conclusions from the memorandum.

Mr. EDWARDS. Without objection, I will insert Dorothy Starbuck's statement into the record at this point.

[The statement of Dorothy Starbuck referred to appears at p. 287.]

Mr. EDWARDS. I yield to the gentleman from Illinois, Mr. Evans.

Mr. EVANS. Thank you, Mr. Chairman.

Mr. Ivers, this case has been going on since 1983, is that correct?

Mr. IVERS. I believe that's correct.

Mr. EVANS. And with further action pending in September, you said?

Mr. IVERS. The trial is scheduled for September.

Mr. EVANS. So just how long is this committee supposed to wait until we find out exactly what goes on there?

Mr. IVERS. I would ask that the committee withhold any judgment on any of the actions or allegations that have been made in this hearing, sir, until after the trial has been held in September.

Mr. EVANS. Well, I don't know if we can wait that long.

I find it curious that you're quoting me, when I said yesterday there were controversial questions of destruction of records, withholding of records, and harassment of VA employees which may involve employees in the Central Office in D.C. are issues in this case. The judge has clearly expressed her concern about possible harassment.

Today, in the testimony of Mr. Boskovich, he indicated, among other things, that "I was also concerned, because after his testimony—" referring to Mr. Abrams "—in San Francisco, Mr. Abrams was given a drawing of a swastika inside of a Star of David by Mr. Wheeler, the former adjudication officer of the Washington regional office. I am not aware whether any action was taken against Mr. Wheeler, although Mr. Abrams' supervisors were informed of this incident."

Now, are you indicating to me that the only way of investigating this has been relegated to the Department of Justice, that the Veterans' Administration's administrative process is not going to be invoked in this, that you're totally foreclosed from investigating this internally, within the Veterans' Administration, or that this committee ought to wait until some court case is resolved on these matters that affect not only these individuals that are involved but their willingness to come forward and give us testimony, to the Congress of the United States, that created the Veterans' Administration? We're supposed to just wait in some kind of absence of court action until we get to the bottom of this?

Aren't you disturbed by these allegations by your own employees?

Mr. IVERS. I am very much disturbed by those allegations, Mr. Evans, and obviously the court was. She referred the matter to the Criminal Justice Division at the Department of Justice, or directed it be referred there. I have not said here, sir, that there will not be an administrative investigation of those actions. However, I have stated that there will be a criminal investigation and that, in my judgment, it is best for us not to do anything that would interfere or hamper that investigation until it's completed.

Mr. EVANS. Are you precluded, then, from moving administratively to investigate this incident?

Mr. IVERS. No.

Mr. EVANS. Then what are you doing about it? Is that your function?

Mr. IVERS. That's not my function to investigate those items.

Mr. EVANS. Well, whose function is it?

Mr. IVERS. It would be referred to the Inspector General by the Administrator.

[Subsequently, the Veterans Administration submitted the following clarifying information:]

> While we have not conducted a formal investigation of the incident, we have contacted Lawrence Wheeler, a former colleague of Mr. Abrams but now (and at the time he drew the swastika) employed by AMVETS. In describing the incident Mr. Wheeler, who himself is Jewish, said the drawing was done in jest and with no intention to influence Mr. Abrams' testimony in the *NARS* case. Bob Yurgal of the Compensation and Pension Service, who was also present in the room when Mr. Wheeler drew the picture, also recalls that it was not, as far as Mr. Yurgal could perceive, intended either to reflect unfavorably on Mr. Abrams' past testimony in the *NARS* case or to influence his future testimony.

Mr. EVANS. Mr. Chairman, I just find this whole matter very disturbing in terms of the way the witnesses have been previously intimidated, I believe, the letters that they've received, and for us not to investigate this or not fully investigate it is a matter of great concern to me.

Again, as I said in my opening statement, this will probably require further action by the full committee, or perhaps a subcommittee. But I am just generally concerned that the VA is not doing enough within its own process to let the people that have come forward, that have tried to be truthful, that have been good employees otherwise, that we're not doing enough to protect them or give them the feeling that there's any kind of climate within the Veterans' Administration itself so that the truth can come out.

I'm going to be looking into this as a member of this committee. I just think there's an attitude problem in the VA if they're not moving quick enough.

Let me go to another area. After the VA was hit with sanctions of over $100,000 by the court for failure to comply with discovery procedures in this case, some interesting documents are surfacing which show, among other things, that the VA, despite earlier denials, does have a centralized method of tracking radiation claims; that VA officials have been aware for some time of the widespread failure of due process standards; that system-wide error rates in claims processing are up two to three times the acceptable levels; that the VA's Central Office is unable in many cases to control the practices of the regional offices which are unfair to veterans; that site visits by Central Office personnel have turned up severe due process problems and very high error rates at numerous regional offices.

So, Mr. Ivers, couldn't a very good, substantial circumstantial case be made that there was more involved in the withholding of these documents than "sloppy management" in the discovery process?

Mr. **Ivers**. I don't believe so.

Mr. **Evans**. You don't believe so.

Mr. **Ivers**. No, not in the withholding of documents, sir.

Mr. **Evans**. Why not? After all, these documents have come forward after the sanctions have been imposed on the Veterans' Administration. These are some serious sanctions—I don't know if they're unprecedented, but they're unprecedented in my knowledge of being leveled against the Veterans' Administration and not other Federal agencies.

Mr. **Ivers**. I'm not denying that they're serious sanctions, and I'm not denying that there were serious problems with the discovery process. There were over 9,000 pages of documents produced prior to the court's order and the sanctions in this case. Those documents were directed toward the specific issue in the case.

Since that time, and in response to a number of unsupported, anonymous allegations, the scope of discovery has been broadened substantially to the point where now those documents that are the subject to discovery in this case constitute virtually the entire work product of the Department of Veterans Benefits and a substantial portion of the work product of other elements of the VA, and we are in the process of producing them.

Mr. **Evans**. I'm over my time, Mr. Chairman. I have plenty of other questions. Maybe I should just wait until everybody else is done.

I yield back my time.

Mr. **Edwards**. We send our condolences to Miss Starbuck, who we just learned is ill and in serious condition at Georgetown Hospital today.

Mr. Ivers or Mr. Vogel, which one of you has the responsibility to ensure compliance with the VA's rules and regulations?

Mr. **Vogel**. It would fall to me, Mr. Chairman, to assure compliance with the laws and regulations. The interpretation of laws, the oversight with respect to putting regulations in place across the board, falls to the General Counsel and the lawyers on his staff.

Mr. **Edwards**. But you have a manual and you have rules and regulations in the manual. Are you responsible, at least partially, for making sure that these rules and regulations that are written in the manual are complied with by the employees?

Mr. **Vogel**. Yes, I am, Mr. Chairman.

Mr. **Edwards**. When did you take over this job of enforcing?

Mr. **Vogel**. In June of 1985, sir.

Mr. **Edwards**. And you are diligently doing that now——

Mr. **Vogel**. Yes, sir.

Mr. **Edwards** [continuing]. Making sure that these rules are complied with?

Mr. **Vogel**. Yes, sir. The very fact that we have a systemic—from the bottom to the top, and the top to the bottom—look at quality, I think will be demonstrated and has been demonstrated by people who have taken a look at it. We're a very large organization and errors will come up from time to time. We can correct them.

Last year we had approximately 5,100,000 adjudication actions that were appealable, just in the compensation and pension programs. We're a large organization. We think that the quality control system, the detection of errors—it's not intended to detect errors, but the fact that we do detect them means the system is working. We find that the Central Office validation of the field station report of quality is within acceptable levels.

Mr. **Edwards**. Mr. Vogel, the three legal advisors, whose job it is is to travel around the country and then come back and report to you, testified an hour or so ago that this is not being done, that regulations and rules aren't being followed out in the countryside.

How do you respond to that testimony which is just the opposite from yours? Don't they come back and report to you?

Mr. **Vogel**. They come back and they make reports, and I hear the reports. We follow-up where we've got problems with return staff visits. We address things that—we expect individuals like that to keep us advised, the line officials and people responsible for program administration, to tell us where there're problems. We can address them through training; we can address them ultimately through disciplinary action if we find they're that severe.

I would generally characterize, the categorization that at least two of those individuals as rather exaggerated.

Mr. **Edwards**. Well, their testimony was that when they came back and reported to you that they had problems, that it resulted in harassment. Is that incorrect?

Mr. **Vogel**. Whatever they did, they came back with survey reports and took a look at the quality, and then communicated that concern to Dr. Moore, the Director of the Compensation and Pension Service, and others, and we have put out directives to the field reminding them of those responsibilities, to articulate the necessity for training.

Just last week we had one of four or five training conferences that provide technical training to rating specialists and people in the authorization activity. They do come back with ideas and we do put them into place. We put them out in technical letters, if necessary, in circulars, signed by me, if necessary, by the changing of—suggesting through the General Counsel a change in regulatory language. They're doing their job, sir, no question about it.

Mr. **Edwards**. The gentleman from Minnesota, Mr. Penny, is recognized.

Mr. **Penny**. Mr. Chairman, I don't have any questions for this panel. I believe Mr. Evans does have further questions, though.

Mr. **Edwards**. Mr. Evans, do you have further questions?

Mr. **Evans**. I have many, Mr. Chairman, and I will beg your discretion. Whatever time you have, I would like as much time as you could possibly give.

Mr. **Edwards**. The gentleman is recognized.

Mr. **Evans**. Mr. Ivers, you have indicated earlier that the VA is going to further pursue internally the matters of the harassment, particularly the harassment of Mr. Abrams, in regards to the swastika allegedly placed on his desk by Mr. Wheeler, is that correct?

Mr. **Ivers**. That's correct.

Mr. **Evans**. But haven't you, in fact, written to Abrams' attorney, stating that the VA is not going to take further action on the harassment case involving the swastika?

Mr. **Ivers**. I don't believe so. I don't believe I ever stated that.

Mr. **Evans**. You don't believe you stated that in a letter?

Mr. **Ivers**. No. I'll look and see if I have a copy of the letter here. If I don't, maybe someone on my staff does.

Mr. **Evans**. Well, if someone wants to look for that, let me further pursue another question.

[See letter at p. 284.]

Going back to discovery again, I guess you were indicating, to my question about sloppy management, that most of these documents have come out as a result of the second or third or perhaps later request of the *NARS* plaintiffs, and that those would not normally have come out, I guess, in the first wave of discovery, and that that happened basically because of these anonymous letters which gave some impetus to *NARS* to ask for further documentation.

But, in regards to the actual facts of the case involving a constitutional challenge to the $10 fee limitation, and then the remand to the Federal court, whether that law was at least unconstitutional to groups of claimants like atomic veterans, don't you think it is pretty bad that the VA did not release evidence when they had a centralized system of tracking radiation claims? Don't you think that's pretty relevant to the case and don't you think it would be more than sloppy management not to disclose that in earlier discovery requests, and the fact that that is specifically related to the facts of that particular case?

Mr. **Ivers**. Would you repeat the question, please?

[Laughter.]

Mr. **Evans**. I don't know if I can repeat all that same question. Let me just make it very simple.

In the first discovery request, why was it that there were denials that the Veterans' Administration had a centralized method of tracking radiation claims? If that isn't sloppy management, what is it?

Mr. **Ivers**. Let me just say this for the record. I was as shocked and as disturbed by the disclosure that those two programs existed as anyone else, and probably anyone in the VA. Once they were disclosed, we did everything we could to bring the information forward, to bring it out and give it to the plaintiffs. I have no explanation and don't intend to try and offer an explanation for why those were not offered before.

I, myself, came up here and testified about a year ago, and I think in the course of my testimony made that same statement, that we didn't have a way to sort those files out. I don't know why they weren't disclosed earlier. I don't believe there was anything intentional or sinister about the fact that they were not disclosed.

I don't know whether John has any additional information to offer on that or not. But I cannot offer an explanation because I, frankly, don't think there is one.

Mr. **Evans**. Mr. Vogel?

Mr. **Vogel**. I quite agree with Mr. Ivers, that it is very difficult to explain and it's embarrassing that it didn't come forth. With respect to one of those two identifiers, I can give you a little story and maybe you can understand how it might have happened.

The Rehabilitation and Education Service put in, for the purpose of tracking education claims, a thing called an identifier in a record. It's the pending issue file. The technicians in the Compensation and Pension Service, they thought that was a pretty good idea so they put it in as well. It was never communicated up the line in that particular service.

Our field personnel have been using that for a little bit of time, because they use our central computer system on a regular basis. They saw that come up. We learned about it and we revealed it. But that's literally how it came into being. It is a management tool. It assists the people in our 58 regional offices in keeping on top of pending cases.

Mr. EVANS. I'm not sure I understand how the whole Veterans' Administration works, because they are the largest agency in the country. But are you essentially saying that the people in charge of discovery from the Veterans' Administration didn't know of this management tool, or that that's possible?

Mr. VOGEL. It's not only possible; it happened.

Mr. EVANS. Well, that's bad enough that people in charge of discovery don't know the way that the Veterans' Administration is being managed. But let me go back to Mr. Ivers.

Your testimony states that files were cleaned out in late June in "the normal course of business". We know these files have not been cleaned out in about 20 years. The VA was in the midst of complying with a series of discovery requests in the *NARS* case. The VA had recently received a copy of a letter alerting the NARS attorney to request specific documents from the VA. Yet you believe the destruction was just housekeeping, in the normal course of business?

Mr. IVERS. That's correct. I don't believe——

Mr. EVANS. It never happened in 20 years——

Mr. IVERS. Housekeeping? I believe there's already been testimony here today that there was housekeeping in 1982 and 1983. Mr. Kenny testified to participating in that in 1982. So it wasn't a 20-year delay. I'll grant you, there are probably a lot of old files and papers in those files.

Mr. EVANS. When is the normal course of business in housecleaning and how often does that take place?

Mr. IVERS. I believe it varies with each staff office. I would have to defer to Mr. Vogel.

Mr. EVANS. And it took place in light of the discovery request, in light of the fact that the VA had received a copy of a letter alerting the *NARS* attorney to request specific documents from the VA?

Mr. VOGEL. Mr. Evans, if I might, various sources of records have various retention spans, based upon the value, the need to preserve. No veterans claims records have been destroyed in any event. That has never been found, nothing that would turn a case by way of allowance or disallowance.

The group that did that, the cleaning out of records, had in there information from surveys done from 1979—pardon me, from 1969 through 1980. They included the tissue copies of notification to stations that they would be there to do surveys, old organizational charts, copies of special quality sheets, the originals of which were still over in the section that did the quality work, the SQC staff, if you picked that up in today's testimony. Copies of old promotion registers. None of the material destroyed, they told me, was dated after 1980, and none of which was pertinent. However, the documents are not here now. They are destroyed. What they were, nobody could say with metaphysical certainty what they are. But I can say that's what the trained consultants told me was in those files, and I have no reason to believe otherwise.

Mr. EVANS. Mr. Vogel, who started this identification system which I talked about earlier? Do you know who started it?

Mr. VOGEL. No, I don't, sir.

Mr. EVANS. Was it Gary Hickman?

Mr. VOGEL. I don't know, sir.

Mr. EVANS. Well, Gary Hickman was in charge of the actual discovery request, was he not?

Mr. VOGEL. Are you talking about the SIRS system and the PIF system, those two systems that were revealed later on?

Mr. EVANS. I believe so. That's a system that allows the VA to have a centralized method of tracking radiation claims.

Mr. VOGEL. I don't know who authored that, or who ultimately——

Mr. EVANS. Gary Hickman was, in fact, in charge of the discovery request, wasn't he?

Mr. VOGEL. Yes, he was.

Mr. EVANS. I would like you to clarify, by letter, whether, in fact, he was or wasn't the person who started that same identification system which can identify these claims.

[Subsequently, the Veterans Administration furnished the following information for the record:]

Mr. Hickman did not participate in design of the PIF (Pending Issue File); he did participate in the design of SIRS (Special Issues Rating system). The remainder of this response addresses the apparent focus of Mr. Evans' line of questioning: management accountability in the *NARS* discovery process.

The PIF records have existed in one form or another since the mid-1970's. In October 1982, DVB Circular 20–82–39 was released to regional offices. The circular generally dealt with work measurement topics and was prepared by staff in the (then) Education Service. However, it also required adjudication personnel to identify certain pending claims allegedly involving radiation exposure by using a "2" as the last digit of the applicable end product code. For example, an original claim for disability compensation would be coded "112" instead of "110" if the claim alleged disability arising from exposure to radiation. We note, however, that no reporting system was developed to capture the coded data.

Education Service personnel obviously would not have dictated requirements for processing controls for compensation claims unless asked to do so by personnel from the Compensation and Pension Service. A review of documentation dealing with Circular 20–82–39 shows only the initials (concurrence) of a retired C&P Service employee.

Mr. Hickman has provided a sworn statement to the court, under penalty of perjury, regarding his recollections about the capability of PIF to identify radiation claims. He states therein that he had no recollection of the capability when it was brought to his attention in approximately September 1986. Mr. Hickman ensured that the General Counsel's staff was aware of the PIF capability as soon as he was.

We regret that we failed to mention PIF timely, but no employee deliberately avoided mention of a capability to track radiation claims from PIF.

Plaintiffs have also alleged deliberate withholding of information about the SIRS system. As discussed in transcripts of hearings held in the District Court in San Francisco in December 1986 and January 1987, plaintiffs believe that information about SIRS was consistently and deliberately withheld since mid-1983 when their initial requests under discovery were filed. SIRS data did not then exist.

In 1983, the only available reports and statistics for radiation claims were manual summaries prepared from reviews of rating decisions. In responding on May 9, 1983, to the "Plaintiff's First Request to Produce Documents for Inspection and Copying," DVB provided copies of the manually prepared summaries and stated, correctly, that any additional detailed response would require claims folder reviews which were burdensome due to their cost-prohibitive nature.

SIRS data were available from about September or October 1984, when the system was installed for use for collection of the information. SIRS reports have been under development since then, with various reports inaugurated since that time.

The first document request received after installation of the SIRS system was the plaintiffs' seventh request, served on April 25, 1986. "Request No. 1" asked for updates to prior request.

DVB attempted to respond by requesting the Depot to provide all DVB circulars which normally would have included DVB Circular 21-84-9 describing the SIRS system. For some reason, this circular was not among those documents returned by plaintiffs after their inspection of the provided documents. If Circular 21-24-9 was not produced, the omission occurred through oversight or inadvertence, not intentionally.

Defendant's initial response of July 25, 1986, to interrogatories in Plaintiffs' Eighth Request to Produce documents was intended to provide information concerning SIRS. However as a result of a typographical error, approximately 13 lines of the intended response were omitted. Thus, while our initial response did specifically identify the SIRS system, it was incomplete. A complete response was subsequently provided to plaintiffs.

The Plaintiffs' Seventh Request for Documents (in April 1986) represented the first opportunity that DVB had to discuss the SIRS system and DVB attempted to do so. SIRS postdated the plaintiffs' first and third requests. No records of second or fourth request exist in DVB, and the fifth and sixth requests clearly dealt only with the Court's overturned preliminary injunction.

Mr. EVANS. I can go on and on, Mr. Chairman. I would just like to ask a few more questions, though.

Mr. EDWARDS. Will the gentleman yield for a moment?

Mr. EVANS. Yes.

Mr. EDWARDS. In talking about Mr. Hickman, Mr. Yurgal and Miss Wheeler, who did not accept the invitation of Mr. Montgomery to come here, did you, Mr. Vogel, have any conversations with these three supervisors about their appearance here?

Mr. VOGEL. No, I didn't, sir.

Mr. EDWARDS. Did you, Mr. Ivers?

Mr. IVERS. No, sir.

Mr. EDWARDS. You mean they did this just on their own?

Mr. IVERS. My office, to my knowledge, was not contacted. I was personally not contacted. Other people who did appear here did contact my office, as did their attorneys. But I have had no contact personally with those three individuals, nor am I aware of anyone in my office with respect to their testimony here.

[Subsequently, the Veterans Administration submitted the following clarifying information:]

Had Mr. Wheeler and Messrs, Hickman and Yurgal been invited to testify in their official capacities, the Veterans Administration certainly would have assured their appearances. As it was, they were invited in their individual capacities only, and because the decision about whether to appear was thus purely a personal one, it would have been inappropriate for Veterans Administration to pressure them to either accept or decline the Committee's invitation.

Mr. EDWARDS. Mr. Vogel, do you know anybody who might have been in touch with these three people who were invited here?

Mr. VOGEL. No, I don't. From time to time I would ask the question do we know who's going to be at the hearing, and supervisors, including the director of the Service, said he's not really sure he's going to be at the hearing. I asked the members of the staff who might be present so we can determine perhaps the duration of it, and nobody could—they turned the question on me and asked me if I knew who was going to be here, and I had no idea, sir.

Mr. **Edwards**. Thank you.

Mr. Evans, we will move now for a few minutes to Senate staffers.

Mr. **Evans**. That's fine.

Mr. **Edwards**. Counsel?

Mr. **Steinberg**. Don and John, it's good to see you here. I want to start by expressing our gratitude for your and your office's continuing cooperation with the Senate committee. We appreciate it very much.

Mr. **Ivers**. Thank you.

Mr. **Vogel**. Thank you, sir.

Mr. **Steinberg**. Don, are you satisfied that you have in place now a system to deal with the discovery requests that is adequate not only insofar as the *NARS* case is concerned but for any future litigation?

Mr. **Ivers**. Yes, I am satisfied with that system. It is described in some detail in my prepared testimony.

Mr. **Steinberg**. And that will apply to all future litigation?

Mr. **Ivers**. That will apply to all future litigation that has the scope that this does. You have to understand that—I would just like to state for the record that the scope of this discovery, in an agency of this size, is probably unprecedented. We deal with discovery matters on an almost daily basis on a much smaller level at each regional office, at each VA medical center, in each office within the Central Office. But this is the first time, to my knowledge, that the Veterans' Administration has ever had to deal with discovery on a national scale with the breadth that this discovery encompasses. As I said earlier, it encompasses virtually the entire work product of the Department of Veterans Benefits at this point.

So yes, I am comfortable with the system we have in place. I'm not going to tell you that, I will have that same system in place for every piece of litigation that the Veterans' Administration is involved in. But any time we have to deal with a broad discovery situation like we have in this case, we will implement a similar system. I think it's a good one.

Mr. **Steinberg**. Thank you.

I think you were present when Senator Cranston indicated in his opening remarks his intention to initiate an extremely thorough as well as expedited investigation by the General Accounting Office into both of the questions that are being covered in this hearing.

Without regard to any compulsions that you are under with respect to the *NARS* litigation, I just want to remind you that, under the U.S. Code, in view of the pendency of a congressional investigation into both the discovery issue and all questions of fair and due process within the Department of Veterans' Benefits, there must be no record destruction whatsoever during the pendency of that congressional investigation.

I assume you're familiar with that and that there will be no record destruction that might in any way relate to the subject matter of this GAO probe.

Mr. **Ivers**. I'm familiar with that. We will cooperate fully with any investigation that the GAO wishes to conduct.

Mr. **Steinberg**. Thank you.

Mr. Vogel, how many site visits would there be in the course of a year, would you say?

Mr. VOGEL. The goal is to do a site visit about every 18 months, more often if we see the necessity, if there are a couple of regional offices that we are paying particular attention to because of some problems, and we've been there every 6 months for the last couple of years. I say 18 months is a goal. We really ceased doing survey visits except where we have specific problems identified in Central Office management or where the local management, the regional office director, asks for specific technical assistance because of a problem in any area.

Mr. STEINBERG. Would there be 40 or 50 a year, something like that?

Mr. VOGEL. I don't think we do that many. All of last year, during the period after we absorbed the Gramm-Rudman cut, which was placed on top of another GOE cut, we essentially suspended routine surveys and only went to those that we thought we could be of particular help, to help local management overcome a problem.

Mr. STEINBERG. Let me just put you on notice that Senator Cranston will submit a written request for copies of all site surveys undertaken since 1981, a summary of the findings and recommendations in those site surveys, copies of all documents that were generated with respect to follow-up on those site surveys, and a summary also of any actions that were taken with respect to the recommendations in those surveys.

I have just one last question. Mr. Ivers, did you send a memorandum dated March 12 to one or more of the witnesses who testified here earlier—Mr. Boskovich, Mr. Abrams, and Mr. Kenney—with respect to their appearance at this joint hearing?

Mr. IVERS. We sent two separate memoranda, one to Mr. Kenny and one to Mr. Boskovich, in response to requests by them in writing to my office with advice with respect to their appearance here today.

Mr. STEINBERG. But none to Mr. Abrams?

Mr. IVERS. We were never contacted by Mr. Abrams, to my knowledge.

Mr. STEINBERG. May I just finish this line, Mr. Chairman, for a moment, please?

Mr. EDWARDS. Yes, go ahead.

Mr. STEINBERG. I have a memorandum here that I believe is a copy of that memorandum, and I would ask that it appear in the record at this point, Mr. Chairman, if that's agreeable.

[The memorandum appears at p. 286.]

Mr. STEINBERG. It is signed over Mr. Ivers' name and appears to be on VA letterhead. The third paragraph reads, "Your rights as an employee will not be affected by your testimony as an individual so long as your testimony is truthful and responsible. Any disciplinary action against you for truthful and responsible testimony would, of course, be inappropriate."

Does that suggest that disciplinary action with respect to testimony that you or someone in the VA deemed not to be responsible would be appropriate?

Mr. IVERS. I don't believe so.

Mr. **Steinberg**. Can we reinterpret this, perhaps, to state that these employees need have no concern about any disciplinary action or any other reprisal with respect to any truthful testimony that they give?

Mr. **Ivers**. That's correct.

Mr. **Steinberg**. And the words "and responsible" are not intended to impose an additional standard in that respect?

Mr. **Ivers**. No. I think "responsible and truthful" in the context of that memorandum are one and the same. I would not interpret it differently.

Mr. **Steinberg**. So we're in agreement on that?

Mr. **Ivers**. Yes.

Mr. **Steinberg**. Thank you very much, Mr. Chairman.

Mr. **Edwards**. Mr. Principi.

Mr. **Principi**. Thank you, Mr. Chairman.

Mr. Vogel, what impact has the broad discovery request had on your Department's ability to deliver veterans' benefits and programs? Please be specific in terms of dollars, employees, copying costs, and other related items of a similar nature.

Mr. **Vogel**. Probably the most difficult issue to deal with you can't put in terms of dollars, in truth. I think the amount of attention, of necessity, being paid to the matter has diverted talents that might otherwise be used to the betterment of the claims process generally and to exercise our oversight responsibilities.

We are duplicating virtually every piece of paper produced in the Department of Veterans Benefits. The regional offices are under a similar burden. We have a certain number of employees dedicated to taking care of veterans' claims, whether it be insurance or compensation or the GI bill. I don't have the numbers with me here, sir, but I would be pleased to provide them for the record, on the storage of computer tapes, the duplicating, and the control of all this information. We're literally going to be swimming in paper soon if we don't get a resolution on the issue within the foreseeable future.

Mr. **Principi**. Thank you.

Mr. **Ivers**. Tony, if I might, I have before me some figures that we'll be glad to supply for the record, that indicate that to date we have expended, in complying with both the protective order and the discovery, a total of $2.1 million.

NARS v. ***Turnage***

VA—Costs to Date (excl. General Counsel)

	Protective Order	Other	Total Costs
DM&S	80,788	17,190	97,978
DVB	31,855	[1]1,371,934	[1]1,403,789
DMA	135	825	960
Budget and Finance			
Pers. and Lab. Rels.	450	900	1,350
Cong. and lg. Affrs.		113	113
Pub. and Cons. Affrs.	90	190	280
ADA for Mgmt.	78	396	474
Prog. An. and Eval.		752	752

***NARS* v. *Turnage*—Continued**

	Protective Order	Other	Total Costs
OIS and T	572,422		572,422
Info. Mgmt. and Stats.	5,094	1,938	7,032
ADA for Logistics		204	204
Ofc. of Admin.	1,490	107	1,597
Ofc. of Facilis	111	19	130
Proc. and Supply		577	577
OEO	322	281	603
IG		5,764	5,764
BVA	1,198	11,492	12,690
Bd. of C. Apps.	31	222	253
Total	$694,064	$1,412,904	$2,106,968

[1] Includes D/J contract for $1.2 million

Mr. Principi. Thank you.

John, on page 19 and 20 of his prepared testimony, Mr. Erspamer states that veteran service officers have failed to act as advocates for veterans, that they have developed "cozy" relationships with VA officials, that they have been co-opted by VA largesse and providing free office space, and that they oppose corrective action because it would be "a threat to their position within the existing system".

What is your experience with veteran service officers and their ability to represent veteran claimants?

Mr. Vogel. My experience has been very positive. The areas to which they confine their attention, that they study and become expert in, makes them very, very good advocates and representatives of the veterans that they do in fact represent. I would characterize them as very vigorous advocates, sometimes to and beyond the point of comfort, if you will, to the point of discomfort. They know the laws; they know our process well. I think they do an excellent job across the board in representing veterans.

To that I might add, Mr. Principi, I referred earlier in a statement to the chairman that we had just done technical training in Pittsburgh, one of many technical training things we're doing this year, and we had invited and did have in attendance service officers to listen to the same technical, in-depth instructions that our own rating specialists and authorizers were getting. We think it is very important that they be up-to-speed, up-to-date, on everything.

Mr. Principi. Thank you.

On pages 12 and 13 of Mr. Erspamer's testimony, he states that the VA interprets statutory presumptions so as to preclude any grant of service-connection where a statutory presumption is not present. Given the 2.2 million veterans that are currently in receipt of service-connected disability compensation, what percentage of those awards are based upon a presumption?

Mr. Vogel. The majority of veterans who are in receipt of compensation from the VA are in receipt of it on a direct service-connected basis as opposed to a presumption. A significant number—I don't know the percentage, Mr. Principi—are service-connected on presumption.

Mr. **Principi.** Would you please provide that information for the record?

Mr. **Vogel.** I would be pleased to, sir.

[Subsequently, the Veterans Administration provided the following information:]

The Veterans Administration does not possess any statistics on the number or percentage of veterans who receive compensation based on presumption, nor do we maintain this information in any readily accessible format, including automated data processing systems. This information could be obtained only by a review of the claims folders of all compensation recipients.

Mr. **Principi.** Thank you, Mr. Chairman.

Mr. **Edwards.** Before I recognize Mr. Evans, what conduct or misbehavior, whatever, that the judge in San Francisco referred to, was responsible for her decision and the fine? What do you think happened? What was going on that resulted in the fine and in her severe criticism?

Mr. **Ivers.** Mr. Chairman, I'm very hesitant to comment on what may have gone through the judge's mind when she arrived at her decision to levy that fine, or assess that penalty.

In reviewing the transcripts of the hearing and the material that she had before her, there was evidence, as I indicated earlier, of what is, in my estimation, very poor management of the discovery process, an unfortunate sequence of timing in purging those files, if you will, none of which, to date, has resulted in any evidence of any destruction of evidence relevant to material to plaintiffs case in chief.

Now, there was some allegation and some assertion by the judge that there were documents that we should have kept, perhaps, that might have been relevant had we known the plaintiff would ask for them. The destruction occurred prior to the publication of the anonymous letters and the issuance of the protective order by the court. Beyond that, Mr. Chairman, I am unable to specifically identify any one specific item that would have led her to assess the penalities. The fact of the matter is, she did. We paid the penalty, we acknowledged the errors that were made, and we're in the process of doing everything we can to get that case on track and ready for trial.

Mr. **Edwards.** If documents were destroyed, and you don't know what they were, how can you say they weren't important?

Mr. **Ivers.** The individuals who were involved in the destruction, Mr. Chairman, did testify before the court and did indicate the general nature of what was destoyed. There was some radiation-related material that was prepared for destruction, but never destroyed, that has been produced. I believe Mr. Vogel earlier described his conversations with the individuals who were directly involved in the cleaning out of those files and their representation to him as to what was destroyed.

Mr. **Edwards.** Well, the court appointed a special master to oversee the VA's future compliance with discovery requests for the *NARS* case, and ordered the VA to develop a plan for ensuring such future compliance; is that correct?

Mr. **Ivers.** That's correct, Mr. Chairman.

Mr. **Edwards.** Mr. Evans.

Mr. Evans. Thank you, Mr. Chairman. I have three areas that I would like to explore just as quickly as we can, and then I will be finished for the day.

Mr. Vogel, the regional office in St. Petersburg, according to documents from your Department, was, instead of scheduling requested hearings, writing the veteran and discouraging them from having their hearings. Furthermore, for 4 years St. Petersburg continued this practice, despite Central Office directives to cease.

Why does it take over 4 years to correct a problem like this?

Mr. Vogel. I think there may have been—in that 4-year period, I'm not sure how prevalent it was. What they had done was attempt to encourage a claimant to come in for an informal hearing, to have an explanation. We learned of that and told them we thought that was an impediment to due process, that it could have the effect on a claimant of believing that they have now had their hearing. We told them to cease doing that.

There has been an allegation that it continued. We haven't seen it in our quality checks. But I talked to the director of that office, to the adjudication personnel, and we don't think it's widespread. At the time they were backlogged with hearings, running out into months, and it was an attempt to cut into that.

Mr. Evans. Can you get us information on what you mean that it probably wasn't widespread? You're investigating this issue right now, you're looking for information?

Mr. Vogel. No, not right now. We have, however, in the period of time between the time we learned of that and the time we told them to cease that practice, we did quality checks of cases and it hasn't popped up as being a prevalent practice.

Mr. Evans. What does that mean, not a prevalent practice?

Mr. Vogel. I don't have numbers, or whether we saw it one or two or more times, if that practice came up or not, I'm not sure.

Mr. Evans. You're saying it's only happened once or twice?

Mr. Vogel. I don't know how often it's happened.

Mr. Evans. Have you written back to those veterans further clarifying their rights under the law?

Mr. Vogel. I don't know what we did in the adjudication of those things. I could provide that, however.

Mr. Evans. Well, we would be interested, I think.

[Subsequently, the Veterans Administration provided the following information:]

The informal hearing process was used at VARO St. Petersburg as a management tool to reduce the time lag between the request for a formal hearing and the time it could be scheduled—5 or 6 months in some cases. It is important to note that at no time were veterans either not informed of or denied the right to a formal hearing.

St. Petersburg's original hearing letters informed the veteran of the delay in the formal hearing schedule, noted the informal hearing option, and concluded with the notice that a formal hearing would be scheduled if the veteran did not reply to the letter within 15 days. Their revised letters were essentially the same, except that they informed the veteran that a formal hearing had been scheduled and notified the veteran of the date and time. Both sets of letters specifically included the notice that an informal hearing did not affect the veteran's right to a formal hearing.

Mr. Evans. The VA regulations hold a veteran accountable for deadlines, regardless of whether he has been provided notice of the deadlines. In 1982, the VA General Counsel said that this provision is unlawful. Why does this provision remain unchanged?

Mr. **Ivers**. Mr. Evans, I believe you're referring to a statement that Mr. Abrams made during the course of his testimony. I would like to take the opportunity here to clarify that.

The General Counsel's office issued an opinion with respect to a proposed Board of Veterans Appeals regulation in part 19, not part 3. Mr. Abrams made that statement and derived that statement he made from that opinion and somehow or another confused it with 38 CFR 3.109(b). We never issued an opinion with respect to that regulation that made that statement. We did make that statement with respect to our proposed BVA regulation.

Mr. **Evans**. Mr. Vogel, Mr. Moore, the Director of the Compensation and Pension Service, wrote a letter dated November 5, 1985—which I would like to have entered into the record, Mr. Chairman, if there is no objection.

Mr. **Edwards**. Without objection.

[The letter appears at p. 248.]

Mr. **Evans**. In his letter he said that many rating boards were not resolving reasonable doubt in favor of the veteran. Are you resolving reasonable doubt in favor of the veteran yet?

Mr. **Vogel**. We endeavor to resolve reasonable doubt in favor of the veteran. Apparently, in the normal course of quality checks of decisions, what the Compensation and Pension Service saw, was it fair to apply to principle and reminded the regional offices that that is part of the law and, moreover, part of the basic underpinning philosophy of the Department.

Mr. **Evans**. Well, for how many years prior to this letter of November 5, 1985, had regional offices not resolved reasonable doubt in favor of the veteran claimant?

Mr. **Vogel**. That very much sounds like "when did you stop beating your wife", Mr. Evans. I can't answer that.

Mr. **Evans**. Well, I would like you to see if you can look into that, and further, if you can tell us anything today, or by letter, if anything has been done to provide a remedy for those veterans who, in fact, did not have reasonable doubt resolved in their favor.

Did you do any follow-up to those veterans? I mean, Mr. Moore is complaining about it in 1985, saying that many rating boards were not resolving reasonable doubt. What, if any, actions have been taken to notify these veterans of any remedies they might have since they were, in fact, denied reasonable doubt in their favors?

Mr. **Vogel**. I will provide an answer for the record, sir. It will take some technical—I'll have technical personnel from my staff assist in going through that.

[Subsequently, the Veterans Administration supplied the following information:]

We note initially that inclusion of comments on a failure to apply the doctrine of reasonable doubt in a general training letter should not be construed as an indication of a serious or widespread misapplication of the regulation. Serious misapplication of any regulation would merit more direct attention.

The letter of November 5, 1985, was one of a series of quarterly training letters intended to point out general problem areas so that improvements might be made in the quality of adjudication actions. This particular letter addressed problems identified in connection with local (i.e. regional office) statistical quality control (SQC).

Paragraph 6 of the letter addressed rating board failure to apply fully the doctrine of reasonable doubt as governed by 38 CFR 3.102. The regulation provides that "when, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim."

Although reaonable doubt is to be resolved in the veteran's favor in every case, recognition of reasonable doubt is a matter of judgment. VA Central Office SQC validation review revealed several instances in which local SQC reviewers were hesitant to assign a deficiency to rating board actions. The local reviewer failed to question the judgment of the rating board unless there was evidence of clear and unmistakable error under 38 CFR 3.105(a). Paragraph 6 of the letter was intended to encourage regional offices to review more carefully situations involving reasonable doubt. Cases in which judgment is questioned may be referred to the Compensation and Pension Service, Quality Review Staff, for an advisory opinion, under 38 CFR 3.105(b).

Errors in application of reasonable doubt, as noted on Central Office SQC, are documented on VA Form 20-6567a-21, copies of which are returned with the claims folders to the regional office of jurisdiction.

Mr. EVANS. I thank the panel for their time, and the chairman for his indulgence.

Mr. EDWARDS. Minority counsel, Mr. Wilson, has some questions and is recognized.

Mr. WILSON. Mr. Zeglin, were you here this morning when Mr. Boskovich was testifying about a conversation that you apparently had with him one evening?

Mr. ZEGLIN. Yes, I was here. I recall that.

Mr. WILSON. Would you give your comments about that conversation as it relates to what he said you said?

Mr. ZEGLIN. Well, I can only say I don't recall ever telling Mr. Boskovich——

Mr. WILSON. Would you put the microphone down a little bit?

Mr. ZEGLIN. I never told Mr. Boskovich that he was the chief witness against the Government in this case. I don't recall ever telling him—and I, in fact, did not tell him—that he should only state anything that he could prove in his deposition.

I do recall telling him, as I tell all of the witnesses who are deposed, to testify truthfully and as accurately as possible; that in terms of making any changes to their deposition transcripts, they could make any changes that they wanted to.

[Subsequently, the Veterans Administration submitted the following clarifying information:]

Mr. Boskovich stated at pp. 5 and 6 of his prepared testimony for this hearing that Mr. Zeglin instructed him, some six months earlier when he (Boskovich) was editing the transcript of his August 27, 1986 deposition, that he (Boskovich) shoud be:

> absolutely certain he could prove everything I said. As a result, I revised some of my statements to soften points that I knew to be true but could not independently corroborate.

However, Mr. Boskovich's sworn testimony at another deposition September 19, 1986, only a few days after the conversations with Mr. Zeglin, supports Mr. Zeglin's version of what was said.

Under extensive questioning about the many changes he had made in the transcript of his earlier deposition, Mr. Boskovich testified as follows:

> Q. Now, at the time you started to make the corrections, what was your understanding as to what rules or standards governed what you could or should correct?
>
> A. I thought that I could correct anything in the deposition, including grammer, punctuation, anything, and anything that was stated; that I should be truthful, that I—If something needed to be clarified, I should clarify it.

Q. Did you understand there were any curbs or restrictions on what you could correct?

A. No, sir.

Q. And what was the source of your understanding about what you could correct?

A. Mr. Zeglin and Ms. Cadieux.

Deposition, p. 16, lines 7-20. (Ms. Cadieux is attorney of record for the Department of Justice.)

Later, at p. 17, lines 5-12, he answered as follows:

Q. What description of what the rules were for correcting depositions did you receive from Mr. Zeglin?

A. To tell the truth, and to make any corrections that I thought needed to be made.

Q. Did you understand that you had the ability to strike testimony, or testimony that you felt might embarrass someone?

A. No.

At p. 22, lines 7-16

Q. Did you make any changes in the changes you had made as a result of your conversations with Mr. Zeglin and Ms. Cadieux?

A. I may have reworded some sentences to make them clearer, but no facts, as I can recall.

Q. No substantive changes?

Ms. Cadieux: What was the question?

Mr. Erspamer: No substantive changes were made.

The Witness: Not that I can recall, no, sir.

At p. 74, lines 11-20:

Q. Mr. Boskovich, would you explain briefly the chronology of what happened when you first got back your clean deposition transcript, through to the point when you swore to that transcript on September 16th; saying what you received, what you did with it and how it was handled, as far as you know?

A. Mr. Zeglin called me on the phone and told me to pick up my deposition. I picked it up. And he told me to be truthful and to make sure that when I said something that I knew it to be true.

At p. 76, lines 12-19:

Q. Did anyone encourage you to change your testimony?

A. No, they did not.

Q. Did anyone order to you (sic) change your testimony?

A. No.

Q. Anyone pressure you in any way to change anything in your testimony?

A. No.

And finally, at the conclusion of his second deposition (p. 93, lines 1-15):

Q. At any time during the one-hour-plus discussion that you had with Ms. Cadieux or Mr. Zeglin—were those the only two parties present, by the way?

A. Yes.

Q. Did either of them suggest to you, at that time, that you should change any answer in any respect?

A. No. They told me just to put down what I though to be true.

Q. And has anyone else, since the time of your deposition to date, suggested to you any changes that you should make in your deposition?

A. No.

Mr. Boskovich also had occasion to testify regarding the matter, under oath in open court, at an evidentiary hearing on December 3, 1986:

Q. You made a number of changes to your first deposition, didn't you?

A. Yes.

Q. Was there an overriding reason for those changes?

Mr. Erspamer: Objected to as compound.

The Court: Objection is overruled. You may answer the question.

The Witness: I though some of the answers needed to be clarified, and upon reflection I thought I could give a better answer.

Q. (By Ms. Cadieux) Why did you feel they needed to be clarified?

A. I thought that some of them could have been misleading, because I was mixed up in the first deposition about what discussions was being referred to.

Transcript, p. 84, lines 15-25, p.. 85, lines 1-4). Later, at p. 106, lines 19-25 and p. 108, lines 1-14:

Q. After your first deposition, you received the transcript and you spent over an hour reviewing the transcript with counsel, correct?
A. Yes.
Q. During that discussion your counsel told you you had complete freedom to change any of the testimony you desired; isn't that correct?

* * * * *

The **Witness**: Yes.
Mr. **Erspamer**: Could the court reporter read it?

(RECORD READ)

The **Witness**: Words to that effect.
Q. (By Mr. **Erspamer**) That included grammar, punctuation, anything that was stated whatsoever?
A. Yes.
Q. And that was Mr. Zeglin and Ms. Cadieux that told you that?
A. Yes.
Q. Also Mr. Zeglin told you, did he not, that you could revise your testimony to what you had actually observed and knew for a fact and delete information you thought you knew or thought remembered or were unsure of?
A. Words that effect. Yes, sir. (sic)

Finally, in reply to direct questioning by Judge Patel, he testified as follows (p. 115, lines 11-22):

The **Court**: Were there any motivations for making any of these changes, other than what you have testified to in these proceedings?
The **Witness**: No.
The **Court**: As I understand it, it was only to clarify matters that you thought were not necessarily clear or may have been confusing in the deposition; is that correct?
The **Witness**: Yes, Ma'am.
The **Court**: and some of that confusion you thought resulted from separating out the two conversations in particular?
The **Witness**: Yes.

Hence Mr. Boskovich's sworn testimony to date has not indicated that Mr. Zeglin told him to "soften" any statements he knew to be true. To the contrary, he has repeatedly acknowledged that he was entreated to be truthful.

Mr. **Wilson**. Mr. Vogel, we have heard testimony this morning about the work measurement system in the Compensation and Pension Service. Would you supply for the record a layman's explanation of exactly how the work measurement system works?

Mr. **Vogel**. I would be pleased to, Mr. Wilson.

[Subsequently, the Veterans Administration submitted the following explanation:]

DVB's current productivity measurement system, which was updated October 1, 1986 is very similar to the Federal Productivity Measurement System administered Government-wide by the Bureau of Labor Statistics. The following is an explanation of how this system works.

Each DVB program has identified the final benefits and services produced by a field station during processing. These workload indicators (or end products) are measured by counting the number of them produced each month in each field station, division and activity. The counts are automatic when the work is accomplished using the Benefits Delivery Network (Target) System; otherwise they are manually recorded.

Each month, AMIS (the Automated Management Information System) computes the weighted output by multiplying work counts by a "base weight." Weighted output is the number of full-time equivalent employees (FTEE) that would have been required to produce the same workload during whatever base period is being used as a reference point for comparison.

Productivity is the weighted output, expressed as the FTEE that woud have been required during the base period to produce the currently measured work divided by the FTEE that actually produced the work. Therefore, if the measured work was accomplished with less FTEE than would have been required during the base period, the productivity index is over 100 and reflects improvement over the base period.

Productivity indices can be calculated using:
Standard base weights using all-station data; or,
Local base weights using the individual station's data.

Mr. WILSON. We have also heard testimony that, in effect, infers at least, that performance awards to employees are given primarily on the basis of productivity almost to the exclusion of quality.

Would you please comment on that?

Mr. VOGEL. That is not so. The performance standards speak to quality and quantity of work. Clearly a person who is a claims examiner and who produced a great number of claims decisions of poor quality would not be rewarded for it but, on the other hand, we would try to remedy that.

I know, referring again to the last technical training conference, the one that we had in Pittsburgh last week, that the Deputy Chief Benefits Director for Program Management—with about a quarter of the very best technicians in the Department there at the meeting—said you are reminded once again that quality is our most important consideration and I'm not terribly concerned about the productivity and effectiveness. If we don't put a quality product out, the numbers mean nothing.

Mr. WILSON. Mr. Vogel, at what level of employee do you present reprimands, in case they're necessary? Is that the GS-13 level? Would you please supply that for the record? And would you also supply for the record if the official personnel files of either Mr. Abrams or Mr. Boskovich indicate that they really got some reprimands as that word is described in the civil service regulations?

Mr. VOGEL. The information in those two individuals' personnel files, is that what you're asking, Mr. Wilson?

Mr. WILSON. Mr. Abrams stated in a conversation with the judge in California that he was reprimanded by Mr. Mars. I think Mr. Boskovich testified this morning that he was also reprimanded. I would like for you to present for the record whether or not they were, in fact, in terms of civil service rules and regulations, reprimanded.

Mr. VOGEL. I would be pleased to, sir.

[Subsequently, the Veterans Administration submitted the following information:]

In a memorandum dated June 24, 1986, the Chief Benefits Director continued a delegation of authority to allow Service Directors in VA Central Office to issue reprimands to employees under their supervision. VA Manual MP-5, part I, chapter 752 defines a reprimand as an official letter of censure given to an employee for misconduct which is placed in the employee's OPF for a period of three years. Neither Mr. Abrams nor Mr. Boskovich has ever been reprimanded to our knowledge as the word is used in the Federal Service. There is no indication in their OPFs of any disciplinary action.

Mr. WILSON. I can ask these next questions I think all together, Mr. Ivers.

Did the district court find that any documents were destroyed after the individual at the VA who had possession of them actually knew about the discovery request?

Mr. IVERS. No.

Mr. WILSON. Did the San Francisco district court find there was a conspiracy in the VA to withhold documents from the court?

Mr. IVERS. No.

Mr. **Wilson**. Has Judge Petel found that anyone at the VA or Department of Justice has intentionally thwarted plaintiffs' discovery efforts?

Mr. **Ivers**. No.

Mr. **Wilson**. Has the court found that the VA's adjudication procedures are unfair and violate due process?

Mr. **Ivers**. No.

Mr. **Wilson**. How many discovery requests has the plaintiff made?

Mr. **Ivers**. I believe we're into the 12th one at this point.

Mr. **Wilson**. Have you put a time factor on that, as Mr. Vogel indicated, or have you put a cost factor on that at all?

Mr. **Ivers**. Cost or time?

Mr. **Wilson**. Both.

Mr. **Ivers**. Well, time—no, I don't have a time factor. As I said, the cost factor that I indicated to you earlier of $2.1 million agencywide involves compliance with both the protective order and the discovery. The discovery alone, the costs of compliance have been about $1.4 million.

Mr. **Wilson**. Mr. Vogel, is there any directive out, of any nature whatsoever, indicating that the witnesses who testified here this morning under no circumstances would be harassed or have visited against them any kind of reprisals?

Mr. **Vogel**. We have—I think you must be referring to a written communication?

Mr. **Wilson**. Yes, sir.

Mr. **Vogel**. There has been no written communication to that effect by me.

Mr. **Wilson**. Have there been verbal?

Mr. **Vogel**. Yes. It's unconscionable to me that anybody in the Department will or has taken any untoward action towards any of those individuals. If the Department of Justice investigation reveals that it was so, we will take appropriate action.

Mr. **Wilson**. To the extent that you're able, Mr. Vogel, could you comment on the conversations that took place or the actions that took place with respect to the possibility of Mr. Abrams becoming an employee of the Board of Veterans Appeals?

Mr. **Vogel**. I have just some sketchy information on that. I understand that after Mr. Abrams had been interviewed by the Board of Veterans Appeals, I believe by the chairman himself, I learned that that has happened, that the practice of the Board of Veterans Appeals was to retain attorneys on the entry level, at the GS–12 level. Mr. Abrams is far up in the GS–13 ranks——

Mr. **Wilson**. Is that a long-standing practice of the Board of Veterans Appeals?

Mr. **Vogel**. Pardon me, sir?

Mr. **Wilson**. Is that a long-standing practice by the chairman of the Appeal Board.

Mr. **Vogel**. It is my understanding it was a long-standing practice. I didn't know that. There are a number of individuals who work as attorneys at the Board of Veterans Appeals who had been with the Department of Veterans Benefits. I just never knew what the entry level was. But I heard after the fact that he sought such a position and wasn't selected.

Mr. **Wilson**. Just one final question, Mr. Vogel.

Are you satisfied that his nonselection for that position in the Board of Veterans Appeals was not in any way concerned with harassment?

Mr. **Vogel**. I am, sir.

Mr. **Wilson**. Thank you, Mr. Chairman.

Mr. **Ivers**. Mr. Chairman, may I offer a comment or two, in addition to what Mr. Vogel said, with respect to employee harassment?

Mr. **Edwards**. Yes, proceed.

Mr. **Ivers**. I will say that, at the direction of the court, I have proposed a notice which would advise employees of their rights, in effect, as a result of testifying before a court or in any other body. The court has not yet approved it for distribution.

[Subsequently, the Veterans' Administration provided the following information:]

[On April 29, 1987, the court approved a modified version of the notice.]

Mr. **Ivers**. We have at the same time counseled the supervisors in the Compensation and Pension Service with respect to harassment and treatment of individuals who have offered testimony in this matter.

Mr. **Wilson**. Thank you, Mr. Chairman.

Mr. **Edwards**. Majority counsel, Mr. Ryan.

Mr. **Ryan**. Just two quick requests.

The chairman would appreciate it, in connection with preparing a response to Senator Cranston's earlier request about site visits, if you could provide an analysis and an historical discussion on the development of operating performance and statistical quality control in the adjudication divisions. I think that would be helpful, in that the chairman would be more likely to read that than 40,000 documents.

[Subsequently, the Veterans Administration submitted the following information:]

The VA first instituted work measurement in 1947. In 1953, a decision was made by DVB to develop a Work Measurement and Performance Standards System. Quality standards were also developed, based on the quality of the end products selected as quantitative reportable work units.

This was a completely manual system designed to measure functions and activities—not individuals. Productivity and quality information were manually accumulated and reported. Detailed operating performance information was provided to first line supervisors, with summarized information going to higher levels of management.

In the early 1960's, the work measurement system changed. First, work sampling became the primary method of determining work rate standards. Second, the Automated Management Information System (AMIS) was designed and implemented within the VA.

During FY 1984, the Adjudication Quality Control Criteria and Standards were updated. These are the criteria and standards used to measure substantive, judgmental, and procedural defects in Adjudication Divisions.

On October 1, 1985, DVB's detailed work measurement system was replaced by a productivity measurement system. As a result of a survey of field stations done in FY 1986, improvements were incorporated in the productivity measurement system October 1, 1986.

The DVB productivity measurement system and the related quality control system are currently being used by Adjudication Divisions to:

(1) Compare current performance with a predetermined base period and standards to audit efficiency of operations at all levels of supervision and management.

(2) Allocate staffing.

(3) Control and forecast future staffing requirements for oeprations management and budget preparation.

(4) Evaluate organizational staff utilization as a basis for improving management performance and total productivity.

(5) Incorporate management improvements into operations on a permanent basis by updating local base weights to reflect current staffing needs of the improved operations.

(6) Develop personnel requirements and/or costs relative to proposed of new legislation.

(7) Evaluate the personnel and operating costs of new or revised procedures.

(8) Evaluate employee suggestions.

Mr. RYAN. Mr. Vogel, it has been asserted that the VA routinely makes errors in 20 to 30 percent of the claims which it adjudicates. Would you care to respond to that?

Mr. VOGEL. Our findings would indicate that the procedural errors, those which have no effect on one's entitlement, the determination as to entitlement—in various programs, education, compensation and pension—can run up to 3 and 4 and 5 and even 6 percent.

The substantive errors, those that strike right at the heart of basic entitlements, run 1½ to 2 percent. We find that on quality checks against those, which is not to say that the error remains uncorrected, by various ways, the influence of service officers and representatives, by inquiries, by the quality controls throughout the entire system, those most often will self-correct.

The number of errors that we find from time to time are a matter of concern. We consider it good news rather than bad news. It's the method by which we posture ourselves to provide training, to provide clarifications to our procedural manuals, to even seek, with the assistance of the General Counsel, some change in regulation which may be procedurally difficult to administer.

The notion of that number is—I think if you probably took a claim from the time it reaches the regional office until—into the mail room—until such time as the claim is finally adjudicated and the individual is notified of his eligibility, there couldn't have been two or three slipups in the process.

But we have reviews from the very time it's placed in the system and the claims establishment thing, the computer assisted thing, right on through the clerks, the adjudicators, the authorizers, the unit chiefs, the section chiefs, and then the reviews that take place in the Central Office. So errors made, if they're small, could occur in the process and are corrected through that ongoing quality review.

Mr. RYAN. Mr. Vogel, what percentage of the substantive errors which are brought to your attention are recified?

Mr. VOGEL. I would have to provide that for the record, sir.

[Subsequently, the Veterans Administration supplied the following information:]

Substantive errors are the most serious, involving an erroneous grant or denial of a benefit or a monetary mispayment when entitlement otherwise exists. As is the case in all errors, the regional office must take corrective action, annotate Form 20-6567a-a-21 with the action taken, and place it in a centralized location.

Central Office does not routinely follow-up to ensure that proper corrective action is taken. However, recognizing a need to confirm that regional offices respond to errors found during our SQC reviews, we recently decided to include a review of their recovery actions for all types of errors, including those classified as substantive. The sampling review occurs in connection with our recurring field station surveys.

Under this approach, we note any deficiencies observed regarding a station's actions to recover errors as indicative of performance. We are not, however, maintaining a formal reporting system to accumulate national data. Should serious compliance problems be observed as we review this area, we shall determine whether a need exists to implement more rigorous reviews and controls.

Mr. EDWARDS. The Senate majority counsel, Mr. Steinberg.

Mr. STEINBERG. Thank you, Mr. Edwards. I just have about 30 more seconds.

First, just following up on what Pat said at the outset, would you make sure that any submissions that you provide for the record that were requested by either side are provided to the other side?

Mr. VOGEL. We would be pleased to.

Mr. STEINBERG. Mr. Ivers, could you please provide for the record the document that you referred to just a moment ago, with respect to no reprisals, that was widely posted, so that could be printed in the record?

Mr. IVERS. Yes, I would be glad to submit not only our proposed notice to all VA employees, which was approved by the court, with minor modifications, but also my memorandum to all DVB supervisors admonishing against any reprisals directed toward those who testify in the case.

[See p. 337.]

Mr. STEINBERG. Finally, on behalf of Senator Cranston—and I'm sure Senator Murkowski and the other members of our committee—I thank Mr. Edwards and, of course, Chairman Montgomery, Pat, Mack, and Marie and others, for the courtesy and cooperation that they extended to the Senate in connection with this joint hearing. We appreciate it very much.

Mr. EDWARDS. We're always glad to have the Senate drop around. It's a pleasure.

I will submit for the record another document and ask that it be included at this point in the record. It's an internal VA study done by Mr. Abrams, dated October-November, 1984.

[The document appears at p. 173.]

Mr. EDWARDS. Mr. Evans?

Mr. EVANS. No more questions for the panel, Mr. Chairman. Just a closing statement, if I could, briefly.

I want to thank all the staff and colleagues from both sides for participating and staying so long, particularly you, Mr. Chairman, in giving me so much time for the last panel.

But after reviewing all this testimony today, I am still frustrated. I still feel that there are many other questions that need to be pursued. I know that Senator Cranston, to his credit, will be pursuing some of these questions through a GAO request and will be working with him to help formulate that. I appreciate his leadership on that.

But I also intend to confer with Chairman Montgomery on perhaps follow-up hearings through my subcommittee, or the full committee, knowing that there are plenty of unanswered questions and the need to pursue this further.

I thank the gentleman for his time today.

Mr. **Ivers**. Mr. Chairman, if I might, we would offer Mr. Abrams' September, 1986 memorandum on due process in connection with the *NARS* case and ask that that be entered into evidence.

Mr. **Edwards**. Without objection, it will be entered.

[See p. 252.]

Mr. **Edwards**. Gentlemen, thank you very much. I believe there are no more questions. We thank you all for your patience. It's been a very valuable hearing.

The hearing is adjourned.

[Whereupon, at 1:45 p.m., the joint committees were adjourned.]

APPENDIX

STATEMENT OF HON. G. V. (SONNY) MONTGOMERY

JOINT OVERSIGHT HEARING ON

ISSUES ARISING IN CONNECTION WITH

NARS V. TURNAGE

MARCH 17, 1987

THE COMMITTEE WILL BE IN ORDER.

THIS MORNING WE ARE MEETING AS A JOINT HOUSE-SENATE COMMITTEE TO HEAR FROM WITNESSES WHO WILL ANSWER QUESTIONS REGARDING THE FINE IMPOSED ON THE VETERANS ADMINISTRATION FOR ITS FAILURE TO COMPLY WITH THE CIVIL DISCOVERY REQUESTS IN THE CASE OF THE NATIONAL ASSOCIATION OF RADIATION SURVIVORS V. TURNAGE.

I AGREED TO THE HEARING WHEN TWO OF MY COLLEAGUES ON THE COMMITTEE CAME TO ME AND URGED THAT THE HEARING BE HELD.

ONE THING SHOULD BE STATED FOR THE SAKE OF THE WITNESSES AND MEMBERS AS WELL. THIS IS NOT A HEARING ON JUDICIAL REVIEW. IN READING THE TESTIMONY OF THE FIRST WITNESS, IT WOULD APPEAR THAT HE THINKS TODAY'S HEARING CONCERNS JUDICIAL REVIEW, AND IT APPEARS THAT HE INTENDS TO PRESENT TESTIMONY TO THAT EFFECT.

THE HOUSE COMMITTEE HELD FOUR FULL DAYS OF HEARINGS LAST YEAR RECEIVING TESTIMONY FROM MORE THAN 30 WITNESSES ON THE ISSUE OF JUDICIAL REVIEW. I BELIEVE THE HOUSE COMMITTEE HAS HEARD ABOUT EVERY ARGUMENT FOR AND AGAINST JUDICIAL REVIEW.

THE MAJOR ISSUE IN THE NARS CASE IS WHETHER THE $10 LIMITATION ON FEES PAID TO ATTORNEYS IN HANDLING VETERANS' CLAIMS IS CONSTITUTIONAL. THE SUPREME COURT HAS DECIDED THAT THE LAW IS CONSTITUTIONAL ON ITS FACE, BUT HAS ALLOWED THE DISTRICT COURT TO DECIDE WHETHER IT MIGHT BE UNCONSTITUTIONAL AS APPLIED TO THE NARS PLAINTIFFS.

AS TO WHETHER THE $10 LIMITATION ON ATTORNEY FEES SHOULD BE CHANGED, MANY ATTORNEYS SAY WE SHOULD LEAVE THE STATUTE ALONE - THAT THEY WILL CONTINUE TO TAKE VETERANS' CASES WITHOUT CHARGE. OTHERS SAY THAT WE NEED TO CHANGE THE ATTORNEY FEE LIMIT SO THERE WILL BE MORE INCENTIVES FOR LAWYERS TO REPRESENT VETERANS. JUST LAST YEAR, A STUDY WAS PUBLISHED BY THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES SAYING THAT THE GOVERNMENT SHOULD BE DOING ALL IT CAN TO ENCOURAGE NON-LAWYER REPRESENTATIVES, MUCH LIKE WE HAVE WITH THE REPRESENTATIVES OF THE VARIOUS VETERANS SERVICE ORGANIZATIONS.

I WANT TO WELCOME MY DISTINGUISHED COLLEAGUES FROM THE SENATE AND I NOW RECOGNIZE MY GOOD FRIEND, THE DISTINGUISHED AND VERY ABLE CHAIRMAN OF THE SENATE COMMITTEE ON VETERANS' AFFAIRS, SENATOR CRANSTON OF CALIFORNIA, FOR HIS OPENING REMARKS.

SENATOR CRANSTON INVITED THE DEPARTMENT OF JUSTICE TO TESTIFY; HOWEVER, LATE FRIDAY THE COMMITTEE RECEIVED A LETTER FROM ASSISTANT ATTORNEY GENERAL JOHN R. BOLTON DECLINING THE INVITATION ON THE BASIS THAT THE DEPARTMENT DOES NOT DISCUSS MATTERS SURROUNDING PENDING LITIGATION EXCEPT IN PLEADINGS OR ARGUMENTS ADDRESSED TO THE COURT. I ASK UNANIMOUS CONSENT THAT THE LETTER FROM THE DEPARTMENT BE INCLUDED AS PART OF THE HEARING RECORD.

SEVERAL OTHER INDIVIDUALS WHOM MR. EDWARDS SUGGESTED BE INVITED ALSO DECLINED TO TESTIFY, AND WITHOUT OBJECTION THEIR RESPONSES WILL BE INCLUDED IN THE HEARING RECORD. THESE INDIVIDUALS ARE GARY HICKMAN, ROBERT YURGAL AND CAROL WHEELER.

THE CHAIRMEN AND RANKING MINORITY MEMBERS OF THE JOINT COMMITTEE RESERVE THE RIGHT TO EXAMINE AND DETERMINE THE RELEVANCY OF ANY INFORMATION REQUESTED TO BE INSERTED IN THE HEARING RECORD.

I WILL REMIND ALL WITNESSES THAT THEY WILL BE REQUIRED TO LIMIT THEIR ORAL TESTIMONY TO TEN MINUTES. YOUR WRITTEN TESTIMONY WILL BE INCLUDED IN THE RECORD IN ITS ENTIRETY.

FOLLOWING THE TESTIMONY OF WITNESSES, MEMBERS WILL BE RECOGNIZED FOR FIVE MINUTES FOR QUESTIONS. MEMBERS WILL BE GIVEN AN OPPORTUNITY TO ASK FURTHER QUESTIONS AFTER ALL MEMBERS HAVE HAD AN OPPORTUNITY TO ASK QUESTIONS THE FIRST TIME AROUND.

REMARKS OF THE HONORABLE GERALD B.H. SOLOMON AT THE HEARING OF THE JOINT COMMITTEES ON VETERANS' AFFAIRS

MARCH 17, 1987

THANK YOU, MR. CHAIRMAN.

WE MEET TODAY TO RECEIVE INFORMATION WITH RESPECT TO ALLEGATIONS MADE CONCERNING THE VETERANS ADMINISTRATION. THAT AGENCY OF GOVERNMENT -- AND EMPLOYEES REPRESENTING IT -- HAVE BEEN THE SUBJECT OF A JUDICIAL FINDING IN THE STATE OF CALIFORNIA AND THE SUBJECT OF PRESS STORIES RELATED TO THAT FINDING.

MR. CHAIRMAN, I TRUST WE CAN ALL AGREE THAT OUR PURPOSE HERE TODAY SHOULD BE VERY LIMITED IN SCOPE. WE HAVE BEFORE US A LETTER FROM THE DEPARTMENT OF JUSTICE EXPLAINING WHY ITS REPRESENTATIVE WILL NOT APPEAR HERE TODAY. TO ME THAT LETTER IS VERY PERSUASIVE. IT STATES THAT "THERE IS A GENERAL AND WELL-ESTABLISHED PRACTICE THAT LITIGANTS SHOULD AVOID DISRUPTING OR PREJUDICING A CASE BY PREMATURELY DISCLOSING MATTERS TO THE MEDIA OR ATTEMPTING TO TRY THEIR CASE TO THE GENERAL PUBLIC."

MR. CHAIRMAN, THE BASIC ALLEGATIONS BEFORE US ARE:

1. THAT THE VA DELIBERATELY "SHREDDED" FILES AND MATERIAL CALLED FOR IN DISCOVERY MOTIONS RELATED TO THE CALIFORNIA COURT CASE.

2. THAT THE VETERANS ADMINISTRATION HARASSED AN EMPLOYEE — OR EMPLOYEES — WHO REPORTED THE ALLEGED "SHREDDING" TO SUPERVISORS AND TO THE CALIFORNIA COURT.

3. THAT THE VA HAS AN INEPT ADJUDICATIVE PROCEDURE THAT INVOLVES "MISCONDUCT," "MISREPRESENTATIONS," "ARBITRARY POWER," "MANIPULATIVE PRACTICES," "UNWRITTEN RULES," "HEARING ABUSES," AND OTHER PROCEDURAL AND SUBSTANTIVE IRREGULARITIES.

4. THAT THE VA HAS POLICIES THAT REWARD EMPLOYEES FOR PRODUCTIVITY ALMOST TO THE EXCLUSION OF QUALITY CONSIDERATIONS.

5. THAT THE VA DENIED A PROMOTION TO A PERSON WHO HAD BEEN HARASSED AND ACTUALLY REPRIMANDED HIM FOR HIS ACTIVITIES.

MR. CHAIRMAN, LET US DETERMINE — AS BEST WE CAN — WHAT ADJUDICATIVE PROCEDURES EXIST AT VA. LET'S DETERMINE — AS BEST WE CAN — WHAT VA DID OR DID NOT DO WITH RESPECT TO "SHREDDING" FILES. LET'S DETERMINE — AS BEST WE CAN — VA'S POLICIES ON PRODUCTIVITY AND QUALITY. LET'S DETERMINE — AS BEST WE CAN — HOW VA REWARDS ITS EMPLOYEES FOR PERFORMANCE. LET'S DETERMINE — AS BEST WE CAN — IF HARASSMENT TOOK PLACE. LET'S DETERMINE — AS BEST WE CAN — IF A PROMOTION WAS UNFAIRLY DENIED. LET'S DETERMINE — AS BEST WE CAN — IF A REPRIMAND ACTUALLY TOOK PLACE.

MR. CHAIRMAN, THESE ARE THE ISSUES THAT GAVE RISE TO THIS HEARING. THESE ARE THE ISSUES THAT GAVE RISE TO THE PRESS STORIES WE HAVE ALL SEEN. I WOULD HOPE THAT WE WOULD STICK TO THEM AS THIS HEARING PROGRESSES.

MR. CHAIRMAN, THERE MAY BE WITNESSES HERE THIS MORNING — AND THERE MAY BE SOME INDIVIDUALS IN THE AUDIENCE — WHO BELIEVE OUR HEARING WILL ALSO FOCUS ON OTHER MATTERS, SUCH AS THE $10 FEE LIMITATION FOR ATTORNEYS WHO REPRESENT VETERANS OR THE VERY INVOLVED QUESTION OF JUDICIAL REVIEW OF VETERANS' CLAIMS. NEITHER OF THESE ISSUES ARE NOW BEFORE THIS COMMITTEE.

MR. CHAIRMAN, I HAVE ONE FINAL COMMENT. I THINK IT TO BE NO COINCIDENCE THAT A FULL PAGE ADVERTISEMENT HAS BEEN PURCHASED TO APPEAR THIS WEEK IN THE WASHINGTON POST. IT MENTIONS YOUR NAME IN A VERY DEROGATORY WAY. I AM TOLD THAT A FULL PAGE AD IN THE POST USUALLY COSTS $32,200. I AM ALSO TOLD, HOWEVER, THAT THIS AD ONLY COST ABOUT $14,000 AND WAS PAID FOR BY AN ANONYMOUS DONOR. IT IS AN AD WHICH BY ITS OWN WORDS IS OBVIOUSLY SPONSORED AND ENDORSED BY THE ORGANIZATION CALLED "THE NATIONAL ASSOCIATION OF RADIATION SURVIVORS."

MR. CHAIRMAN, I HAVE READ THIS AD. IT GENERALLY CONDEMNS THE GOVERNMENT OF THE UNITED STATES . IT SAYS THAT THERE HAS BEEN "DESTRUCTION OF EVIDENCE" AND STRONGLY IMPLIES THAT THIS HAS BEEN BY THE HAND OF GOVERNMENT OFFICIALS. IT SAYS THAT COMPENSATION STIPENDS AVAILABLE TO VETERANS ARE "MEAGER." THIS IS COMPENSATION, MR. CHAIRMAN, FOR DISABLED SERVICE-CONNECTED VETERANS. THIS CHANGE INVOLVES AN ISSUE ANNUALLY ADDRESSED AS A PRIORITY MATTER BY THE HOUSE AND SENATE VETERANS' COMMITTEES AND IN FACT BY THE ENTIRE CONGRESS.

NO OTHER ORGANIZATION — NOT THE AMERICAN LEGION, NOT THE VETERANS OF FOREIGN WARS, NOT THE DISABLED AMERICAN VETERANS, NOT THE AMVETS, NOT THE MILITARY ORDER OF THE PURPLE HEART, NOT THE PARALYZED VETERANS OF AMERICA, NOT THE BLINDED VETERANS ASSOCIATION — NOT ANY OTHER ORGANIZATION — HAS EVER MADE SUCH AN OUTLANDISH CHARGE.

MR. CHAIRMAN, THE ADVERTISEMENT SINGLES YOU OUT AS AN ARCH VILLAIN. YOU ARE DESCRIBED AS FOLLOWS: AND I QUOTE, "FOR ALMOST A DECADE, MONTGOMERY HAS MANAGED TO KILL EVERY SINGLE BILL INTRODUCED IN HIS COMMITTEE TO RESTORE THE BASIC RIGHTS OF CITIZENSHIP TO OUR DISABLED VETERANS."

WELL, MR. CHAIRMAN, I KNOW YOU HAVE A VERY BROAD BACK AND THAT YOU CAN TAKE EVERY KIND OF CRITICISM EVEN WHEN IT IS NOT REMOTELY WARRANTED. HOWEVER, JUST LET ME SAY THAT I HAVE FOUND YOU TO BE A TOWERING CHAMPION FOR ALL VETERANS — PARTICULARLY THOSE DISABLED IN THE SERVICE OF THEIR COUNTRY. YOU DON'T DESERVE THIS KIND OF TIRADE AND I, FOR ONE, DENOUNCE IT.

I PREDICT THAT JUST A FEW HOURS FROM NOW THE HOUSE OF REPRESENTATIVES WILL PAY YOU GREAT HONOR. IT WILL RENAME THE ALL-VOLUNTEER GI BILL AND HEREAFTER IT WILL BE CALLED THE "MONTGOMERY GI BILL." THIS ACTION IS MORE THAN AN ADEQUATE ANSWER TO THE DESPICABLE ATTACK UPON YOU AND YOUR SPLENDID RECORD OF SERVICE NOT ONLY TO VETERANS, BUT ALSO TO THIS GREAT NATION.

MR. CHAIRMAN, YOU ARE LOVED AND RESPECTED IN THE CONGRESS OF THE UNITED STATES AND THROUGHOUT THIS COUNTRY. AND, I AM HONORED TO BEAR WITNESS TO THAT FACT.

THANK YOU, MR. CHAIRMAN.

OPENING STATEMENT OF SENATOR FRANK H. MURKOWSKI
NARS VS TURNAGE HEARING
MARCH 17, 1987

THANK YOU, MR. CHAIRMAN. I AM PLEASED TO BE WITH YOU AND MY COLLEAGUES THIS MORNING FOR THIS HEARING. I BELIEVE THIS HEARING SHOULD FOCUS ON ONE ISSUE. CAN VETERANS AND THE CONGRESS RETAIN THEIR CONFIDENCE IN THE VA CLAIMS ADJUDICATION PROCESS? AS PART OF OUR OVERSIGHT RESPONSIBILITY OVER THE VA, WE IN CONGRESS MUST ENSURE THAT VETERANS RECEIVE THE BENEFITS TO WHICH THEY ARE ENTITLED.

I AM CONCERNED THAT OUR ABILITY TO ACCOMPLISH THAT GOAL MAY BE IMPAIRED BY UNSUPPORTED AND SOMETIMES ANONYMOUS ALLEGATIONS ABOUT THE VETERANS' ADMINISTRATION, THE WORK OF VETERANS' SERVICE OFFICERS, AND MEMBERS OF CONGRESS.

I WAS DISAPPOINTED TO READ ASSERTIONS IN AN AD IN TODAY'S WASHINGTON POST FROM AN ANONYMOUS SOURCE THAT THE CHAIRMAN OF THE HOUSE COMMITTEE ON VETERANS' AFFAIRS HAS ACTED AGAINST THE INTEREST OF VETERANS AND THEIR RIGHTS. ANYONE WANTING TO CREATE A RECORD OF ADVOCACY AND ACTION FOR VETERANS COULD DO NO BETTER THAN TO COPY THE RECORD OF SONNY MONTGOMERY. CHAIRMAN MONTGOMERY AND HIS RECORD ARE VISIBLE FOR ALL THE WORLD TO SEE. I FIND IT INTERESTING THAT THE AD PRESENTED ONLY NEGATIVE ASPECTS AND FAILED TO PRESENT A BALANCED VIEWPOINT ON WHAT THE VA AND THE CONGRESS HAS DONE FOR ATOMIC VETERANS. NOT ONE WORD WAS MENTIONED ABOUT THE MANY PIECES OF LEGISLATION -- ONE OF WHICH I INTRODUCED, ALONG WITH MANY OF MY COLLEAGUES -- TO ADDRESS THE PLIGHT OF ATOMIC VETERANS. THE legislation which I recently introduced is strongly supported by the National Association of Atomic Veterans and the Disabled American Veterans. One witness today states that compensation claims are "inevitably denied for failure of proof." The 2.2 million veterans receiving almost $10 billion in tax-free compensation cast some doubt on this assertion.

I am concerned by selective quotations generally circulating from the court record concerning the discovery process in the NARS vs Turnage lawsuit. I cannot, and will not, defend, condone or associate myself with the destruction or withholding of evidence or the harassment or intimidation of any VA employee who has presented evidence related to this litigation, if it is found to occur. Those are issues which should be, and will be, resolved by the courts, and not the Congress. However, I do not believe veterans are well-served by quotations which imply the VA -- and dedicated employees of that Agency --acted maliciously when, in fact, the judge to date has not found any malicious intent. I am terribly disappointed that a witness before our Committee today would describe VA employees as capricious, petty bureaucrats deserving nothing more than our disdain. This name calling serves no useful purpose.

I have reviewed some of the materials which have come to light as a result of the lawsuit discovery process. I have seen the Inspector General's report dated July 15, 1982, which shows an error rate higher than that reported by the VA's Department of Veterans' Benefits internal quality control system. We are led to believe that this is a clear indication of a pattern of conduct on the part of the

VA TO DENY VETERANS' CLAIMS. WHAT WE ARE NOT TOLD; HOWEVER, IS THAT THE IG FOUND THAT THE ERRORS ARE MUCH MORE LIKELY TO FAVOR VETERAN CLAIMANTS AND NOT THE GOVERNMENT. ACCORDING TO THE INSPECTOR GENERAL, OF ALL ERRONEOUS PAYMENTS, 93.4 PERCENT OR $171 MILLION ARE IN OVERPAYMENTS TO VETERANS.

I AM DISAPPOINTED THAT SOME INDIVIDUALS HAVE CHOSEN TO ATTACK THE OUTSTANDING RECORD OF VETERANS' SERVICE OFFICERS WHO REPRESENT VETERAN CLAIMANTS AT NO CHARGE. IN ALASKA, WE ARE FORTUNATE TO HAVE PEOPLE WITH THE VETERANS' SERVICE ORGANIZATIONS WHOSE KNOWLEDGE OF VA BENEFITS AND ADVOCACY FOR VETERANS IS SECOND TO NONE. AND I AM SURE THIS RECORD OF ACCOMPLISHMENT EXTENDS TO THE LOWER 48 AS WELL. LET ME READ FROM A VERY RECENT REPORT FILED BY THE DEPARTMENT OF VETERANS' AFFAIRS FOR THE STATE OF OREGON REGARDING A STATE-RUN PILOT PROGRAM TO OVERCOME THE $10 FEE LIMITATION BY USING STATE FUNDS TO PROVIDE ATTORNEYS TO VETERANS IN THE PREPARATION, PRESENTATION AND PROSECUTION OF CLAIMS UNDER THE LAWS ADMINISTERED BY THE VETERANS' ADMINISTRATION. THE REPORT STATES THAT THE ATTORNEYS CHARGED $11,281 WITH NO TANGIBLE RESULTS FOR VETERANS DUE TO THE ATTORNEY ASSISTANCE. ONE ATTORNEY REPORTED THAT IN THE CASES REFERRED TO HIM, HALF OF WHICH WERE AGENT ORANGE AND RADIATION CASES, THE PRIOR WORK BY EXISTING VETERAN SERVICE OFFICERS HAD BEEN, AND I QUOTE "THOROUGH AND HAD LEFT NO STONE UNTURNED.", END QUOTE. HE HAD, QUOTE "NO OPTION BUT TO GO BACK OVER THE SAME GROUND.", END QUOTE. ACCORDING TO THE ATTORNEY, QUOTE "ALL CASES THAT I HAVE BEEN ASSIGNED HAVE BEEN FULLY DEVELOPED. SERVICE OFFICERS DESERVE CREDIT FOR EXHAUSTIVE AND

THOROUGH WORK, AND I SHOULD ADD THAT NOT ONE VETERAN EXPRESSED ANY DISSATISFACTION WHATSOEVER FOR WORK DONE ON THEIR CLAIMS BY OREGON COUNTY VETERANS' SERVICE OFFICERS OR ACCREDITED REPRESENTATIVES. IN FACT, JUST ABOUT ALL THE VETERANS EXPRESSED PRAISE AND GRATITUDE FOR THE SERVICE OFFICERS, EVEN THOUGH THEIR PARTICULAR CLAIMS MAY HAVE BEEN DENIED.", END OF QUOTE.

IN CONCLUSION, MR. CHAIRMAN, I DON'T WANT TO MINIMIZE THE GRAVITY I PLACE ON THE ISSUES RAISED BY THE INFORMATION WHICH LED TO THIS HEARING. NEITHER THE VA NOR VETERANS SHOULD INTERPRET MY CONCERN AS ACCEPTANCE OF THE STATUS QUO OR REJECTION OF THE RELEVANCE OR IMPORTANCE OF THE ISSUES RAISED HERE. AS I SAID, I WILL NOT DEFEND, CONDONE OR ASSOCIATE MYSELF WITH THE DESTRUCTION OR WITHHOLDING OF EVIDENCE OR INTIMIDATION OR HARASSMENT OF WITNESSES, IF IT IS FOUND TO OCCUR. NOR WILL I SHRINK FROM TAKING WHATEVER MEASURES ARE NECESSARY TO ENSURE THAT THE VA, IN BOTH POLICY AND PRACTICE, EVALUATES VETERANS' CLAIMS FAIRLY AND ACCURATELY. THAT IS MY BOTTOM LINE; THAT IS MY AGENDA. **I INTEND TO WORK CONSTRUCTIVELY TO PROTECT THE INTEREST OF THE VETERANS WHOM OUR COMMITTEES, AND THE VA, ARE CHARGED WITH SERVING.**

THANK YOU, MR. CHAIRMAN.

STATEMENT OF REPRESENTATIVE JAMES J. FLORIO
Joint House & Senate Veterans Affairs Committee Hearing

Last year, as news reports of the National Association of Radiation Survivors' lawsuit against the Veterans Administration began to focus on reports of the whole sale destruction and alteration of VA documents I began to become concerned about obvious problems with the existing system.

As the findings of the Federal Court indicate there have indeed been widespread difficulties throughout the VA system as a whole. This is not a San Francisco Regional Office problem or one only in California. Facts indicate, and I think testimony today will indicate, that the problems are endemic to the entire system.

My concern lies with the veteran. The VA was originally set up in 1930 with a built-in bias towards the veteran. This bias or sympathy towards a veteran and his claim was based on the words of Lincoln when he said "that we must care for him who shall have bourne the battle and for his widow and orphan". This concern always translated into a belief that the Veterans Administration acted as an advocate of a veteran and his application for a claim or benefit.

It was this long-held belief that the VA was an active partner with a veteran in his search to obtain a claim or benefit which effectively thwarted the issue of "judicial review" for many years. Advocates of the existing system were able to point to the VA's sole position as a the agency which, by law, had to give veterans "the benefit of the doubt" in cases of determining eligiblity for compensation. As long as this system worked, many thought, there was no need to reform it.

Last year, there was an important vote in the Committee on Veterans Affairs. That vote was on "judicial review", specifically whether to approve a bill introduced by Congressman Edwards of California which would have afforded veterans the right to due process within the court system after the appeals route within the existing VA system was exhausted. The bill failed to gain approval by a vote of 20 - 12.

I was a cosponsor of the bill and voted to approve it last summer during the Committee's vote. I am a cosponsor of the bill, again, this year. After reading and hearing all that I have heard about the NARS v. Turnage case I am more convinced than ever about the need for veterans to have access to the courts. Simply put, no matter how laudable or perfect the goals of an agency may be when abuses occur those affected by those mistakes must have recourse. In NARS v. Turnage the recourse was the unprecedented legal suit brought by NARS in federal court. But how many hundreds if not thousands of others are being denied any recourse to what may be long years of appeal and frustration.

I am not against the VA or anti-VA. The agency is far too good and far too sucessful for any but the uninformed to be hostile towards it. I believe that had individuals been allowed the right to bring their own cases forward in court that many of the abuses which we examine here today would never have occurred. The system is designed, now, to be non-responsive to the individual once the initial approval or disapproval determination is made. We must work to insure that the system remain responsive to the individual throughout the entire process -- right down to the final examination and judgement is given the veteran.

I applaud the employees of the VA who have come forward to tell of suspicions which they may have had. It must take courage to report those feelings.

I am interested in hearing the answers of the VA when confronted with questions relating to whether documents were destroyed or altered. And more importantly I am interested in working with the entire Committee and the veterans organizations to help restructure the system -- if called for -- in a manner to avoid these problems in the future. We have many fine people in the VA, the service organizations and on both sides of this issue in the Congress. There is no reason that we can't work together on this problem and solve it. Millions of veterans in this Nation demand that we do.

OPENING STATEMENT

SENATOR ALAN CRANSTON, CHAIRMAN

COMMITTEE ON VETERANS' AFFAIRS

UNITED STATES SENATE

JOINT INVESTIGATIVE HEARING

ON ISSUES ARISING IN CONNECTION WITH NARS V. TURNAGE

MARCH 17, 1987

GOOD MORNING AND WELCOME TO TODAY'S JOINT HOUSE AND SENATE VETERANS' AFFAIRS COMMITTEES HEARING TO INVESTIGATE SERIOUS QUESTIONS WHICH HAVE ARISEN OUT OF THE NARS V. TURNAGE LITIGATION. THESE QUESTIONS CONCERN THE V.A.'S APPARENTLY RATHER CAVALIER ATTITUDE TOWARDS ITS OBLIGATIONS AS A PARTY TO AN ACTION IN A COURT OF LAW -- AN ATTITUDE SUGGESTING THAT SOME IN THE V.A. MAY HAVE CONSIDERED THE AGENCY ABOVE THE LAW TO THE POINT WHERE A U.S. DISTRICT COURT HAS FOUND THAT SOME V.A. EMPLOYEES MADE MISLEADING STATEMENTS UNDER OATH AND TO THE POINT WHERE THE DESTRUCTION OF DOCUMENTS WAS COUNTENANCED EVEN THOUGH IT WAS FORESEEABLE THAT THE VA MIGHT WELL BE REQUIRED BY LAW TO PRODUCE THEM FOR THE PLAINTIFFS. EVEN MORE SIGNIFICANT, HOWEVER, ARE ALLEGATIONS ARISING OUT OF THIS LITIGATION THAT SUGGEST SIGNIFICANT FLAWS IN THE V.A.'S CLAIMS ADJUDICATION PROCESS AND QUALITY CONTROL PROCEDURES.

IN INVESTIGATING THESE ISSUES, WE ARE CARRYING OUT ONE OF THE MOST IMPORTANT FUNCTIONS OF THE VETERANS' AFFAIRS COMMITTEES: OVERSIGHT OF THE V.A. SYSTEM IN ORDER TO ENSURE THAT IT DOES INDEED MEET ITS STATUTORY RESPONSIBILITIES TO OUR VETERANS AND THEIR DEPENDENTS. I AM SURE WE ALL SHARE THE GOAL OF ENSURING THAT THESE MEN AND WOMEN RECEIVE SERVICES AND BENEFITS DUE THEM ~~TO OUR NATION'S VETERANS~~ IN ACCORDANCE WITH THE LAWS ENACTED BY THE CONGRESS.

I AM GREATLY CONCERNED ABOUT THE V.A.'S ATTITUDE TOWARDS ITS LEGAL OBLIGATIONS AS A DEFENDANT IN A LAWSUIT, AN ATTITUDE WHICH, IN THIS CASE, RESULTED IN THE COURT FINING THE AGENCY $115,000. THE TESTIMONY BEFORE THE COURT REVEALED THAT THE V.A. FAILED TO MEET THE OBLIGATIONS REQUIRED OF EVERY LITIGANT, WHICH CERTAINLY CANNOT BE LESS FOR AN AGENCY OF THE UNITED STATES GOVERNMENT. REGARDLESS OF WHETHER THE VA'S FAILURE TO PRODUCE REQUIRED DOCUMENTS, OR TO ENSURE THAT RELEVANT DOCUMENTS WERE NOT DESTROYED, OR TO RESPOND TRUTHFULLY AND NOT MISLEADINGLY, WERE THE RESULT OF WILLFULNESS OR GROSS NEGLIGENCE, I FIND TOTALLY UNACCEPTABLE THE ABANDONMENT OF PROPER SUPERVISORY RESPONSIBILITY BY MANAGEMENT-LEVEL VA EMPLOYEES. MANAGEMENT OFFICIALS NOT ONLY FAILED TO EXERCISE ADEQUATE SUPERVISION OVER SUBORDINATE EMPLOYEES, BUT THEY ALSO APPEAR TO HAVE ACTED IN SUCH A WAY AS TO PERMIT VA EMPLOYEES ASSIGNED TO DETERMINE AND LOCATE DOCUMENTS IN RESPONSE TO DISCOVERY TO BECOME ISOLATED FROM THOSE VA EMPLOYEES WHO ACTUALLY WERE KNOWLEDGEABLE ABOUT THE KINDS OF DOCUMENTS WHICH THE PLAINTIFFS HAD REQUESTED. THESE ACTIONS OR INACTIONS CLEARLY GIVE RISE TO INFERENCES THAT THE FOSTERING OF IGNORANCE WITHIN THE AGENCY MIGHT HAVE BEEN USED AS A MEANS OF EVADING THE VA'S LEGAL OBLIGATIONS TO TURN OVER RELEVANT DOCUMENTS IN THE DISCOVERY PROCESS. OF EQUALLY GRAVE CONCERN, MOREOVER, EVEN AFTER CERTAIN SPECIFIC DISCOVERY REQUESTS WERE MADE AND COMMUNICATED WITHIN THE AGENCY, THE FURTHER DESTRUCTION OF RELEVANT DOCUMENTS WAS CONTEMPLATED -- AND WOULD HAVE BEEN CARRIED OUT BUT FOR THE INTERVENTION OF SOME FORTUITOUS EVENTS.

SURELY, THE GOVERNMENT OWES TO ITS CITIZENS A GREATER SENSE OF DEDICATION TO THE FAITHFUL EXECUTION OF THE LAWS -- ALL OF THE LAWS OF THE UNITED STATES.

AS I NOTED A MOMENT AGO, HOWEVER, EVEN MORE SERIOUS THAN THE DISCOVERY ABUSES ARE THE QUESTIONS ABOUT THE INTEGRITY OF THE V.A., CLAIMS ADJUDICATION PROCESS ITSELF. V.A. DOCUMENTS PRODUCED IN THE COURSE OF THE NARS CASE REVEAL AN EMPHASIS ON PRODUCTIVITY OVER QUALITY, AND AN INCENTIVE SYSTEM THAT APPEARS TO REWARD SPEED IN HANDLING CLAIMS EVEN IN THE FACE OF POSSIBLE FUNDAMENTAL UNFAIRNESS TO VETERANS. THERE IS EVIDENCE THAT THE PRESENT CLAIMS ADJUDICATION PROCESS MAY ENCOURAGE THE USE OF CERTAIN TECHNIQUES TO SPEED CLAIMS PROCESSING THAT HAVE RESULTED IN VETERANS BEING DENIED THEIR RIGHT TO A HEARING, HAVING THEIR CLAIMS IMPROPERLY DISALLOWED BECAUSE THEY HAVE NOT PRODUCED UNNECESSARY AND EVEN UNAVAILABLE DOCUMENTARY EVIDENCE, AND BEING WRONGLY NOTIFIED THAT THEY HAVE LESS TIME TO COMPLETE AN APPLICATION FOR BENEFITS THAN THEY ACTUALLY DO. IF SUCH METHODS OF PROCESSING APPLICATIONS FOR BENEFITS DO EXIST, THEY CLEARLY RESULT IN THE DENIAL OF FAIR PROCESS TO VETERANS, WHICH MAY, IN TURN, CAUSE THE DENIAL OF BENEFITS TO WHICH THOSE VETERANS MAY BE ENTITLED.

ALTHOUGH THESE PROBLEMS MAY BE MORE SEVERE IN SOME V.A. REGIONAL OFFICES THAN OTHERS, SERIOUS QUESTIONS HAVE BEEN RAISED REGARDING BOTH THE DENIAL OF FAIRNESS AND ATTEMPTS TO COVER IT UP -- OR AT LEAST TO DO NOTHING ABOUT IT. IT IS OUR OBLIGATION TO SEE THAT THESE QUESTIONS ARE ANSWERED DEFINITELY AND SWIFTLY.

I INTEND TO TAKE TWO STEPS TO ENSURE THAT VIOLATIONS OF LEGAL PROCESS AS WELL AS FAIR PROCESS FIND NO HOME WITHIN THE VA. FIRST, I AM ASKING THE COMPTROLLER GENERAL OF THE UNITED STATES TO CONDUCT A COMPLETE INVESTIGATION OF BOTH THE DISCOVERY AND DUE PROCESS ISSUES WHICH HAVE BEEN RAISED IN THE NARS LITIGATION AND THIS HEARING. I WILL ASK THE G.A.O. TO DEVOTE MAXIMUM RESOURCES TO THIS INVESTIGATION AND TO ATTACH MAXIMUM URGENCY TO IT.

SECOND, THE DUE PROCESS QUESTIONS RAISED IN THIS CASE POINT UP THE CLEAR NEED FOR REMEDIAL LEGISLATION TO ENSURE THAT THE V.A. FULFILLS ITS MISSION OF PROVIDING FAIRNESS AND THE BENEFIT OF REASONABLE DOUBT TO OUR

VETERANS. SUCH LEGISLATION WOULD SPECIFY IN LAW VARIOUS REGULATIONS WHICH IT APPEARS THE V.A. DOES NOT FOLLOW AND DOES NOT INTEND TO FOLLOW AND SHOULD CHANGE THE CURRENT EMPHASIS ON PRODUCTIVITY TO ONE WHICH ALSO PROVIDES AN INCENTIVE FOR QUALITY. I INTEND TO SEE SUCH LEGISLATION PASSED BY THIS CONGRESS.

BEFORE I CLOSE, I WANT TO NOTE MY COMMITMENT TO BRING ABOUT DURING THIS SESSION A RESOLUTION OF THE VERY BASIC ISSUES THAT SURROUND THIS HEARING AND THE NARS LITIGATION: FIRST, THE PRECLUSION OF JUDICIAL REVIEW; SECOND, THE ANACHRONISTIC $10 ATTORNEY-FEE LIMITATION; AND, THIRD, THE PROVISION OF FAIR COMPENSATION FOR VETERANS AND THEIR SURVIVORS BASED ON EXPOSURE TO IONIZING RADIATION FROM NUCLEAR EXPLOSIONS. WE MUST NOT LOSE SIGHT OF THESE VERY FUNDAMENTAL MATTERS, AND I WILL NOT.

FINALLY, I ESPECIALLY THANK THOSE INDIVIDUALS WHO, IN RESPONSE TO OUR INVITATION, HAVE COME HERE FROM THE V.A. TO TESTIFY TODAY AS PRIVATE CITIZENS. I WOULD LIKE TO MAKE CLEAR, AS THE CHAIRMAN OF THE SENATE COMMITTEE ON VETERANS' AFFAIRS, THAT REPRISALS IN ANY FORM AGAINST THESE V.A. EMPLOYEES BECAUSE OF THEIR WILLINGNESS TO RESPOND TO THE CONGRESS' INVITATION TO TESTIFY IN THIS HEARING OR THEIR TRUTHFUL TESTIMONY IN COURT WILL ABSOLUTELY NOT BE TOLERATED.

ORIGINAL

NATIONAL ASSOCIATION OF
RADIATION SURVIVORS
VETERANS, CIVILIANS, VICTIMS, FRIENDS

78 El Camino Real
Berkeley, CA. 94705

PREPARED STATEMENT OF GORDON P. ERSPAMER, ATTORNEY FOR NATIONAL ASSOCIATION OF RADIATION SURVIVORS JOINT SESSION, UNITED STATES SENATE AND HOUSE OF REPRESENTATIVES COMMITTEE ON VETERANS AFFAIRS (March 17, 1987)

A. INTRODUCTION

1. I am a member of the law firm of Morrison & Foerster, and specialize primarily in intellectual property matters and antitrust litigation. I have been actively involved in veterans' issues on a *pro bono* basis since 1980. During that time Morrison & Foerster has devoted over 4,500 hours at no charge to counseling individual veterans, advising veterans groups concerning legislation, regulations, VA procedures and other matters and representing veterans' groups (particularly atomic veterans' organizations such as the National Association of Radiation Survivors ("NARS"), and Vietnam veteran non-profit organizations such as Swords to Plowshares Veterans Rights Organization). I personally have spent over 2750 *pro bono* hours in the above time span on these endeavors. In addition, I have represented my mother in a service-connected VA claim arising out of the death of my late

father, Lt.j.g. Ernest G. Erspamer, a Navy metallurgical engineer who participated in Operation Crossroads in 1946. My father, who conducted hydrographic surveys of the Bikini Atoll after Shots Able and Baker, contracted polycythemia vera, a rare blood disorder associated with radiation exposure, in 1976-77, and died of chronic myelogenous leukemia, another radiogenic disease, in 1980. His VA service-connected disability and death claims, denied by a regional office, have been pending since 1979, and are currently awaiting decision by the Board of Veterans Appeals.

2. I am a member of the Legal Advisory Board of the National Association of Radiation Survivors ("NARS"), and Vice-President and a member of the Board of Directors of Crossroads 40, a non-profit corporation, which planned and conducted a ceremony in 1986 in Bikini to commemorate the fortieth anniversary of Operation Crossroads. In addition, I am lead counsel for the plaintiffs in National Association of Radiation Survivors v. Walters, No. C83-1861 MHP, 589 F. Supp. 1302 (N.D. Cal. 1983), rev'd and remanded, 105 S. Ct. 3180 (1985), an action challenging the constitutionality of the $10 limit on attorneys' fees applicable to Veterans Administration claims, which has been in existence in some form since the Civil War. In that action, a class of Ionizing Radiation claimants, including atomic veterans and their survivors, is seeking to overturn the $10 cap as applied to ionizing radiation claims. Simply stated, the

atomic veterans seek freedom to retain attorneys at their own expense just like other Americans do.

3. I am pleased to be invited to speak by the Chairmen and the Honorable Members of the House and Senate Veteran Affairs Committees concerning the condition of the VA adjudication system. I hope to be able to offer you insights into the reasons behind the serious problems currently being experienced by the VA adjudication system.

B. CHARACTERISTICS OF VA ADJUDICATION SYSTEM

1. Closed adjudication system: "The Iron Triangle"

The VA adjudication system is unique among federal administrative agencies in that it is a closed adjudication system, stemming in large part from the combined effect of three prohibitions. First, VA decisions, unlike other federal agency decisions, (like Social Security or AFDC), are not subject to judicial review, regardless of how irrational they might be. Thus, to the extent the VA errs, it does so with finality. Second, the VA claims process is the exclusive remedy for injured veterans, who, alone among our citizens, are barred by the *Feres* doctrine from seeking redress in the courts. (The *Feres* doctrine bars veterans from bringing any action against the government arising out of their military service.) Consequently, the amount of the stipend for service-connected death and disability compensation is a ceiling on the veteran's total recovery, and the veteran denied VA benefits has no alternative remedy. Third, veterans are precluded by law from paying an attorney or other representative more than $10.00 to advise them or represent them before the VA. This combined effect of the Iron Triangle of legal restrictions described above is unparalleled. These mutual reinforcing restrictions on veterans' rights insulate and shield the VA, its decisions, and its practices from public visibility and accountability. In a very real sense, neither the VA, Congress, nor anyone else has any effective ability to monitor the activities of the VA and insure its conduct conforms to the rule of law.

Thus, veterans are the most disabled discrete population group in modern America in terms of legal rights. The rights of veterans are far more circumscribed than those of welfare recipients, Social Security claimants, indigents, and, ironically, those of accused criminals, who are often provided legal counsel at Government expense. What factors, one might ponder, account for this anomalous situation? The explanation surely is partly historical, reflecting the Government's traditional paternalism toward veterans. The $10.00 fee limitation, for example, was originally enacted in 1862 to attempt to prevent unscrupulous attorneys from fleecing Civil War widows. Veterans were able to obtain statutory benefits early in our history, and it is almost as if the constitutional rights of veterans froze at that same early juncture, while those of welfare recipients, accused criminals and others expanded. Two of the deepest ironies of the veterans' modern predicament is that the VA now force-feeds the paternalistic artifacts of the past down the throat of the veteran, and the traditional service organizations have become the VA's staunchest allies in defending the antediluvian VA system. The time to view veterans as incapable of making their own decisions, if that time ever existed, has long since passed. Veterans do not need oppression operating under the guise of paternalism.

2. VA Misconduct in the NARS Case

The effects of a system founded on the principle of absolute discretion were illustrated by recent developments in the NARS litigation. The latest chapter concerns the VA's reckless disregard for its obligations as a party under our judicial system. Included in the acts that gave rise to a sanctions award against the VA in excess of $100,000 were the following:

(1) Document destruction: The wholesale shredding of agency documents the VA admitted were relevant to the NARS action, including audit reports of due process violations in VA regional offices and other documents that showed why the VA adjudication system is "broke";

(2) Misrepresentations: An extended series of what the Judge found to be "distortions, misrepresentations and misleading information" by the VA in papers filed with the court over a period of four years, including a series of statements that the VA had no ability to identify ionizing radiation claim files, when, in fact, the VA had two computer systems designed to track pending and resolved ionizing radiation claims -- PIF and SIRS; and

(3) Document suppression: The withholding of documents clearly covered by outstanding document requests,

including internal reports criticizing the fairness of VA procedures and decisions, which the Judge termed a "deliberate recalcitrance" and a "callous disregard for the lawful processes of the Court." See selected document excerpts, Appendix A.

When you read the documents the VA withheld or sought to destroy, you understand the impetus for such acts for the VA's own documents portray an agency with pronounced internal problems in a wide variety of areas. These documents are the key to understanding the significance of the VA's acts in NARS.

More ominous still was the VA's reaction to the developing crisis within the agency. As the revelations of misconduct mounted, the VA began to threaten, harass, and intimidate those few of its own officials who honored their obligation to tell the truth, several of whom are scheduled to appear before this joint hearing. These included threats to the families and careers of the most courageous of their own. Furthermore, the NARS hearing established that VA employees who reported due process violations or attempted to spur reform were subject to transfer, poor performance reviews, and other retaliatory measures. Thus, the very VA that is supposed to act as the veteran's friend, advocate, ally, and comforter, all rolled into one, is now the subject of a criminal investigation for obstruction of justice.

Do the multiple acts of misconduct found by the Judge to have occurred in the NARS case represent, as some have suggested, an aberration or the misguided acts of lower echelon officials? Hardly. Acts of this type are endemic in a system that is insulated from judicial review, devoid of the traditional rights afforded by our democratic system, and driven by the basic engine of production. Acts of the type uncovered in the NARS case occur undetected every day within the VA; the NARS case simply presented an opportunity -- perhaps the first opportunity -- to penetrate the insulating wall and capture a glimpse of the internal workings of the Veterans Administration.

The Judge's findings of misconduct and reckless disregard for legal processes, unfortunately, are all too consistent with the pattern of administrative behavior reflected in the VA's own internal studies, which have only recently come to light. That attitude is one of an agency that is accountable to no one and that in a very real sense views itself the ultimate arbiter of its workings.

If the VA is willing to commit the patently improper acts uncovered in the NARS case in a public setting against parties represented by counsel, what type of "parade of horribles" can Congress expect it to be committing against unrepresented individual veterans who have no right to judicial review of VA decisions?

3. Manifestations of Exercise of Arbitrary Power Uncovered in NARS Litigation

It should come as no surprise to any serious student of history or administrative behavior that a system that lacks accountability breeds abuses. Lord Acton said it best: "Power tends to corrupt; absolute power corrupts absolutely." It was precisely the documents the VA unlawfully withheld in NARS that identified these abuses of power. The following section addresses some of the phenomena revealed in discovery conducted by NARS:

a. Manipulative Practices

Discovery conducted in the NARS case has revealed that manipulative practices such as the churning of claims are widespread. The VA has for many years been plagued by serious, intractable problems arising out of the system it employs to rate adjudicator performance and assign merit awards. The performance of VA adjudicators is measured in large part based on how fast they process claims. Adjudicators receive "work credits" for a variety of adjudication decisions or tasks according to a prescribed schedule. Thus, an adjudicator receives a credit of 1.27 hours for a rating decision in an original compensation claim, and 1.25 hours for authorization activities concerning an initial death compensation claim. This system not only places great pressure on adjudicators to process claims expeditiously, but has led to a number of creative efforts to "beat the system." Instead of "deciding" claims, adjudicators begin first to "process," and then to "dispose of" claims. Thus, a number of adjudicators seized upon the VA's "record purpose disallowance procedure" -- a euphemistic expression -- to enhance their productivity statistics at the expense of veterans. Under this procedure, a claim may be administratively denied for "failure to prosecute," and a work credit taken, where the veteran fails to respond to a VA request for information within a specified period of time, usually 60 days. (Significantly, the VA has never recognized the basic tension that exists between requiring veterans to document their claim and the VA's own obligation under 38 C.F.R. § 3.103 to assist claimants in developing all facts necessary to support their claims).

A pattern began to develop where adjudicators would "churn" VA claims by: (1) prematurely denying claims without notice because of the veteran's failure to respond to information requests or giving the veteran an inadequate amount of time to respond to the request; (2) denying claims where no information request had been sent or where the veteran had actually made a timely response; (3) sending requests for information not needed to adjudicate a claim or which the veteran could not be expected to obtain, and denying the claim when the veteran failed to respond; and (4) a host of other similar practices. The end result for the adjudicator is receipt of the same work credit he would have received if he had processed the claim through to conclusion, and the productivity statistics of his regional office are artificially boosted at the same time. The VA Central Office has simply been unable or unwilling to stamp out or even arrest these abuses. Similarly, service officers have tolerated or acquiesced in these unlawful practices.

b. Hearing Abuses

Discovery in the NARS case has also uncovered clear abuses of other due process rights held by veterans, including the right to a hearing. Despite the existence of VA regulations guaranteeing claimants a right to a hearing "at any time on any issue" 38 C.F.R. § 3.103(c), several regional offices for many years operated under policies which denied hearings to any claimant until after a decision has been made, and sent form letters to veterans requesting a hearing, which attempted to persuade the veteran to waive the right to a hearing based upon misleading statements. The prejudice veterans suffer from these unlawful practices is considerable. First, initial VA decisions are rarely changed. Second, the policy trounces on the fundamental right to a hearing, which is held to be a sacred aspect of due process in our jurisprudence. Third, VA statistics show that veterans who obtain hearings are almost twice as apt to prevail as those who do not. Yet VA statistics also show that only 1-5% of claimants actually obtain hearings. Notwithstanding corrective measures recommended by Ronald Abrams, Barry Boskovich, and others, the abnormally low frequency of hearings in regional offices has not changed appreciably for many years.

c. Creation of unwritten rules and procedures

Another incident of the closed VA adjudication system is the gradual creation and application of a de facto or unwritten series of rules, standards, and procedures, which supersede and depart from the official rules and regulations, a "subculture" of sorts or a "system within the system." Not surprisingly, it is the imaginary world of theory that the VA seeks to defend, and not the corrupt system it has degenerated to in practice. This divergence between appearance and reality is particularly difficult to detect or correct. An example of this duality is an unofficial rule among regional offices to deny all ionizing radiation claims absent specific direction from the Advisory Review Staff of the Compensation and Pension Service. Thus, despite multiple efforts by Congress to improve the ability of atomic veterans to collect VA benefits, the Board of Veterans Appeal ("BVA") grant rates on these claims have in fact steadily declined over the last six years, plummeting from 2.5% in 1982 to 0% in 1986 and 1987.

BVA Success Rates
Ionizing Radiation Claims

FY	Number of Claims	Grants	Grant Rate
FY 1982	159	4	2.5%
FY 1983	112	1	.9%
FY 1984	137	1	.7%
FY 1985	172	1	.6%
FY 1986	162	0	0%
FY 1987 (first quarter)	14	0	0%

Contrast these statistics with the following statement by Dorothy L. Starbuck, Chief Benefits Director, in a memorandum dated August 24, 1979, which was among the documents the VA withheld from production in NARS until March 5, 1987:

> It is estimated that 25% of the 250,000 [atomic] veterans, or 65,200 will acquire

> cancer. Of this figure of 65,200 veterans, 40,000 have already acquired the disease. It is assumed that one-half or 20,000, of these 40,000 cancer cases are living and 20,000 are deceased. [Emphasis added].

According to 1986 Statistical Abstracts, the expected cancer rates for males aged 50 is 4.02/1,000 individuals or approximately 10,000 deaths for a population of 250,000. Thus, it appears that the VA has admitted that 75% of all cancer deaths of atomic veterans, through 1979, were caused by the atomic bomb testing program. Of these 30,000 veterans whose deaths were attributable to radiation exposure through 1979, a maximum of only 17 have received VA compensation.

d. Other Irregularities

Other procedural and substantive irregularities occur frequently, and all too often they go undetected due to the absence of judicial review and denial of access to attorneys. Examples include the following:
(1) extraordinarily high true error rates, often far higher than VA's own definition of tolerable limits or reported error rates; (2) VA reliance upon material not of record in making a decision; (3) the VA's failure to consider submissions by a claimant; (4) the assigning of claims for decision to a rating board which was not present at a personal hearing or the same rating board which made an initial decision denying the claim; and (5) interpretation of statutory presumptions of eligibility for benefits to preclude any grant where the statutory presumption is

absent. In virtually every claim file I have reviewed, and there have been many, I have detected multiple errors of these types.

4. Circulation of Myths about VA Adjudication System

Given the true picture that emerges from a study of the internal workings of the Veterans Administration, it is startling to find the extent to which myths concerning the VA adjudication process continue to be circulated and perpetuated. (See, e.g., Letter to members of Congress sent by Burt L. Talcott, Associate Deputy Administrator for Congressional and Intergovernmental Affairs, dated February 13, 1987). As the following section demonstrates, the arguments the VA musters to oppose reform are not worthy of serious consideration.

a. Nature of Process

Most common among these myths is that the VA claims process is simple, informal and nonadversarial, and that the VA's mission is solely to serve the veteran. Some go so far as to even characterize the VA as "an advocate for veterans." This is not an accurate description. The proliferation of a body of complex rules and regulations has greatly complicated the adjudication process. The rules and regulations applied by the VA often involve a variety of sources, including regulations, circulars, directives, unpublished adjudication memoranda, and even verbal guidelines. That VA rules and procedures are complex enough to require legal representation is highlighted by the fact that the VA employs over 800 paid attorneys who decide claims, prepare statements of the case, write BVA decisions, and assist in the promulgation of VA regulations.

It is true that the VA does not enforce formal rules of evidence and its procedures are substantially less formal than those involved in civil litigation. Likewise, the process is overtly nonconfrontational (which is not the same thing as being nonadversarial). Yet it is obvious that the interests of VA adjudicators and veterans often depart. VA adjudicators cannot serve their employer and veterans at the same time, particularly in light of the pressure of Gramm-Rudman and recent budgetary constraints.

In conclusion, a widespread need exists for veterans to have free access to attorneys to counsel them about their rights, assist in the gathering and presentation of evidence, and do all the other things participants in our legal system generally depend upon attorneys to do.

b. VA Provision of Necessary Assistance to Veterans

Yet another myth is that the VA devotes the time necessary to gather the facts to support the veterans' claims for benefits. In fact, the assistance rendered by VA adjudicators is limited to attempts to procure medical and service records. The VA conceded in NARS that it makes no effort to locate or interview witnesses to the disabling event, obtain additional documentary evidence, refer issues to experts, or perform any other acts to develop key facts. Similarly, the VA rarely exercises its statutory subpoena power to obtain records to support a claim. 38 U.S.C. § 3311. VA statistics produced in NARS show that the VA nationwide issued only five subpoenas between 1976 and 1984, most of which sought proof of claimant fraud.

The most dangerous aspect of the myth that the VA develops all the necessary facts to support a veteran's claim is that many veterans are led to believe and rely upon it. They proceed -- by themselves -- to describe the "barebones" facts in the small space provided on the VA standard claim form (VA Form 21-526), submit it to the VA, and wait. Inevitably, the claim is eventually denied for failure of proof. Disgruntled, the veteran might appeal, with the same result. The uninformed veteran, who by definition is disabled, frequently never understands that in reality it is his or her burden to collect and introduce the evidence needed to support his or her claim. According to VA statistics produced in NARS v. Walters, the VA spends an average total time of but 2.84 hours processing a disability claim, leaving an inadequate amount of time to develop the facts concerning all but the most simple claims. Needless to say, a complex claim (such as an atomic veterans or asbestos claim) supported only by service records is bound to fail.

c. Adjudication of Claims on Their Merits

Another prevalent myth is that VA claims are typically resolved on their merits. Contrary to widespread supposition, a large percentage of VA decisions are not based on the merits of the claims. Rather, many VA claims are denied as a result of claim abandonment by veterans, frequently because veterans are intimidated by the complexity of VA regulations and procedures or too sick to gather evidence necessary to document their claims. In some quarters, for example, as many as 90% of the claims denied in the Northern California regional office involved abandoned claims. The abnormally high claim abandonment rates manifest the fact that disabled veterans, with or without assistance from service officers, are simply unable to carry through on their claims.

d. "Dilution" of VA Benefits

The VA judicial review "fact sheet," circulated in February, 1987, suggests that elimination of the fee limitation would lead to a dilution of veterans benefits by "additional costs." This reasoning is illogical for several reasons. First, our free market system is based upon the premise that, where information is freely distributed, the consumer will make the proper decision. If free service representation is a better "deal" for veterans than paid attorneys, our system is predicated on the notion that veterans will make the proper choices. Moreover, the VA argument assumes that veterans would retain attorneys before first attempting to prosecute a claim with the free services of a service representative. Any rational model of decision-making would suggest that attorneys would be retained only by claimants who had lost, all of whom have "everything to gain and nothing to lose." (The VA omits to disclose that approximately half of all claimants lose.) It would be far more gratifying to claimants if the VA were to guide its paternalistic sympathy, assuming it is genuine, toward improving its adjudication procedures rather than asserting them to attempt justify the panoply of obstacles to recovery the VA has erected. Veterans certainly are capable of deciding under what conditions their claims warrant the assistance of counsel.

e. "Windfalls" to Attorneys

It is wholly spurious for the VA to argue that attorneys are the impetus behind legislation to restore veterans' civil rights. Veterans law is decidedly one of the least lucrative segments of the practice of law, and would continue to be so even if the fee limitation were removed. The VA's attempt to portray attorneys as greedily waiting on the sidelines is no more than a thinly veiled attempt to appeal to your prejudices. Far from questioning the motivation of the private bar, Congress should question the sincerity of an agency that consistently attempts to raise the supposed interests of the veteran to oppose reforms that that very class of veterans so fervently desires.

f. "Delay" and "Complications"

Given the adjudication abuses and shoddy performance of VA adjudicators regarding decision quality and timeliness, it is disingenuous for the VA to contend that giving veterans the right to pay an attorney more than $10.00 will complicate and delay the adjudication process.

It is difficult to fathom a system more cumbersome, protracted, and baffling to the veteran than the existing one. It is predicated upon a fundamental imbalance -- the VA has the attorneys and the resources, and the disabled veteran stands alone. The VA has had the opportunity to demonstrate its administrative benevolence under this one-sided existing system. Yet the VA has shown that it is not worthy of our trust. Rather, it has shown us that it deserves our disdain.

g. The "Adversarial" Court Process

The VA's assertion that the creation of a new right -- judicial review of VA decisions -- would disserve veterans is dishonest. Veterans could only benefit from a further level of review of decisions denying their claims. The VA does not seek to avoid judicial review because of any concern for the veteran. Rather, it seeks to avoid judicial review because it fundamentally lacks confidence in its own decision-making processes. The VA simply prefers to perpetuate its "Dark Ages" system model, a model that forces the veteran to depend on the caprice of petty bureaucrats.

h. "Overburdened Court System"

Last in the VA's laundry list of arguments is its supposed concern about an "overburdened" court system. With all due respect to the VA's expression of solicitude for the judicial branch of government, the VA's resort to an argument of this type is a desperate argument of last resort and an admission of the weakness of its case. Why should veterans be singled out for discriminatory treatment denying access to our court system? Why are veterans less deserving that AFDC recipients, Social Security claimants, workers' compensation claimants, everybody else? What is the VA's rationale for attempting to turn the red badge of courage into a red badge of servitude?

i. Abilities of Service Officers

Another prevailing myth is that lay representatives from service organizations are highly skilled advocates for veterans. While service officers can provide limited assistance in "garden-variety" claims, actual scrutiny of claims files handled by service officers shows that nearly all, if not all, lack the ability and resources to handle claims of any complexity, a class of claims that the VA's own analysis shows amounts to 30-50% of all claims. (Abrams Memo.) It is in particularly complex claims such as atomic veteran claims or asbestos claims that the proficiency of service officers are drawn most severely into question. It is a fact that our disabled veterans are not obtaining the skilled representation they need. Indeed, many service officers have conceded to me their inability to properly handle complex claims, which usually require expert medical and scientific testimony about exposure, latency periods and causation, and the collection of vast amounts of documentary, technical and testimonial evidence. Service organizations' budgetary restrictions alone preclude the type of claim development most complex claims require.

Moreover, service officers fail to act as advocates for veterans. Many have developed "cozy" relationships with

VA officials and are reluctant to challenge agency decisions or accept unpopular claims. Others have been co-opted by VA largesse, including free office space and telephones, or intimidated by VA threats to withdraw those services. It is my firm belief that many service officers oppose corrective legislation to restore veterans' basic civil rights because they are responsive to VA pressure to forestall change and because they perceive change as a threat to their position within the existing system.

5. Primitive Nature of VA Administration Methods

While the VA has attempted to improve its claim control methods in recent years through implementation and improvement of its TARGET, VARMS, and AMIS systems, by any objective standard, the control methods utilized in the current VA adjudication system are primitive. The VA still maintains claim files in hard copy. Thus, it is only possible for one person or office to have access to a claim file at a single time. It is still the case that veterans' files are frequently lost or misplaced. In addition, the time required to adjudicate claims is inordinate in many instances; in my experience it is not uncommon for atomic veterans' claims to last 5-10 years. Typically, delays of this magnitude mean that ionizing radiation disability claims become death claims. Likewise, the employees the VA relies upon to decide claims are frequently unqualified to make the judgments and decisions to which they are assigned, and the caseload on adjudicators is severe. In 1983, for example, the Northern California Regional office employed only 76 claims examiners and clerks to handle over 62,000 claims, an average of 816 claims each. As a result, correspondence frequently goes unanswered, and successful telephone inquiries of the VA are virtually impossible. Finally, the validation and quality control procedures used by the VA are inadequate to monitor or control the behavior and practices of VA regional offices, as has been recognized in the VA's own internal analyses. (See Appendix A).

C. CONCLUSION

The primary consequence of the current VA adjudication system is that VA decisions lack reliability, and many deserving veterans must tolerate disability without compensation or death with no provision for the needs of their families. It particularly disturbs me that error rates appear to be extremely high with respect to service-connected death and disability compensation, which is the heart of the VA benefit system. The VA compensation system has totally failed the atomic veteran and other veterans with complex claims. The problems uncovered in NARS, however, are not limited to atomic veterans. They infect the entire adjudication process.

We should ask ourselves, why does the VA so bitterly resist legislation which would restore the basic rights of citizenship to our veterans and give meaning to the VA's own motto, "For he who hath borne the battle"? Why is the VA unwilling to defend its decisions and practices in a public setting? The answer unfortunately lies in the illusions shattered by the widespread adjudication abuses uncovered in *NARS*. The VA is loathe to defend its actions for embarrassment would be the result. The *NARS* experience is the paradigm example of why the VA resists any measure which would expose its practices to public scrutiny.

Absent corrective legislation, I see three developing trends that will have a great impact upon the VA adjudication system. First, I foresage a gradual deterioration of the VA adjudication system as budget and personnel cuts further impact the VA's ability to control and discover systemic abuses. Second, there will be a proliferation of due process cases filed against the VA. More and more frequently, the VA will be called upon in court to defend its practices and procedures, and the veteran and the taxpayers will be footing the bill. Third, I predict that there will be an explosion in the number of malpractice actions filed against service organizations and service officers. To the extent service officers continue to claim the ability to act as lawyer-substitutes, they will be held to the same standard of care as attorneys under our malpractice laws.

March 13, 1987.

Gordon P. Erspamer

Gordon P. Erspamer

APPENDIX A

Excerpts from VA Documents Withheld in NARS Case

Among the statements found in the VA's own analysis of its operations were the following:

A. "Findings on Quality Review reveal a national pattern of failure to take action, improper development, inadequate notification, and premature denials. There is also a pattern of errors involving a complete absence of notification." (CPS White Paper).

B. "The results of regional office SQC [Systematic Quality Control] reviews are cursory, are not independent, and reviewers lack the technical expertise to find errors." (IG Report).

C. "In December 1984, a Field Director stated in connection with a staff analysis, 'All adjudication divisions seem to have a Critical Quality Situation.' This study confirms his statement. It is obvious we cannot entirely rely on the 'quality figures' reported by our local offices . . . . In order to protect the Veterans Administration against constitutional attack, our local quality review procedures must be upgraded."

"The reason quality is so important for procedural due process purposes is that we cannot provide fair service to our claimants unless we give them a quality product. All our regulations, and manual provisions protecting procedural due process mean very little if they are not followed by our local offices." (Emphasis added).

"Our managers are pressured to produce. At the present time, it is obvious they are not reporting accurate quality levels. It had been noted in earlier analysis of Central SQC, that claims are not being controlled properly, controls are being cancelled unnecessarily, claims are being denied prematurely and in some cases procedural and appellate rights are not being provided." (CPS White Paper).

D. "The staff of quality review, 210 C, summarized 1,730 cases from approximately 11 regional offices in October and November 1984 . . . .

It is estimated that a significant percentage (over 50 percent), of the errors found on Central Office Quality Review are caused by managers attempting to "overcome" the current management evolution system. A close analysis reveals that, in certain areas, we have become constitutionally vulnerable . . . There is also a pattern of claims being delayed, claims improperly developed, and claims prematurely denied . . . ." (CPS White Paper).

E. "SUBJ: Statistical Quality Review

1. "In 1982, the IG released a study which purportedly showed that actual error rates in cases worked by Adjudication personnel were substantially higher than error rates reported following SQC."

2. "In 1983, the Grace Commission released a study of delivery of benefits by the VA which purportedly showed that actual error rates in cases worked by

Adjudication personnel were substantially higher than error rates reported following SQC."

3. "In 1984, the soon to be released Internal Control Pension study alleges that actual error rates in cases worked by Adjudication personnel were substantially higher than error rates reported following SQC.

4. In April 1984 a study of SQC validation was conducted by the staff of 210A. The operating files for 30 randomly selected stations were reviewed, and the last semi-annual staff analysis was examined to determine reported error rates for authorization and rating activities and whether the error rates were validated on CO audit.

a. 19 of 30 (63.3%) stations failed to validate 1 or more reported error levels in the authorization activity;

b. 6 of 30 (20%) stations failed to validate 1 or more reported error levels in the rating activity;

c. 7 of the 11 stations which validated all reported error levels indicated that quality exceeded (was worse than) the MAL in at least 1 area.

d. During Staff visits, reviews are made of cases already reviewed during local SQC. A sample of 5 stations which were visited during the past year showed that 3.6% more countable substantive errors and 34.5% more countable judgment deficiencies were identified than had been discovered during the local SQC."

F. "Mr. Erspamer can show that it is in the best interest of our managers to have their people do, as quickly as they can, as many cases as possible. He can also show that adjudication duties dealing with the fairness of the adjudication process such as: control of claims, supervisory review of old claims, thorough development, recognition of all issues, providing adequate notice, documenting that notice was given, and careful quality review, tend to adversely affect gross productivity and timeliness statistics."

"Because the central office does not require its regional offices to validate their local quality review, Mr. Erspamer will contend that it is in the best interest of some of our managers to deny or ignore the due process rights of their claimants. He will argue that because due process procedures increase the time it takes to adjudicate a claim, thereby slowing production, it is not in the best financial interest of our managers to follow our regulations and directives dealing with due process."

"Mr. Erspamer can show that a manager's bonus and merit pay evaluation is based in part on the adjudication division's productivity. He will state that the system encourages some adjudication managers to report incorrect quality levels because they know that their failure to do this part of their job will not be held against them. If Mr. Erspamer can show that our system pits the financial interest of adjudication officers against the fair and reasonable treatment of our claimants, he would be well on his way to proving the VA does have an unfair, adversarial claims adjudication system."

"Mr. Erspamer has obtained reports identifying regional offices that prematurely denied claims without notice so that credit for completed work could be taken (Baltimore). He has survey trip reports and white papers showing that certain stations: ignored claims (Phoenix), established and cancelled controls improperly (Baltimore, Hartford, San Francisco, WRO), discouraged complete development (Baltimore), ignored or did not emphasize documentation of due process and carelessly performed local quality review (many regional offices). (Abrams CPS Memorandum)."

COPY

JAMES J. GARRETT
GORDON P. ERSPAMER
MICHAEL F. RAM
THOMAS C. VINJE
MORRISON & FOERSTER
California Center
345 California Street
San Francisco, California 94104-2105
Telephone: (415) 434-7000

Attorneys for Plaintiffs

ORIGINAL
FILED
MAR 10 1987
WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, *et al.*,

Plaintiffs,

v.

THOMAS K. TURNAGE, *et al.*,

Defendants.

No. C-83-1861-MHP-CW

PLAINTIFFS' SUGGESTED MODIFICATIONS OF NOTICES AND PLANS REQUIRED BY JANUARY 8, 1987 ORDER

Plaintiffs submit the following revised copies of the proposed notices and plans suggested by defendants in their filing in Response to the Court's January 8, 1987 oral order, filed on January 21, 1987:

(1) Notice of Discovery Obligations (Exhibit A);

(2) Discovery Plan of Veterans Administration (Exhibit B); and

~~Exhibit A~~

(3) Notice of Pending Court Action (Exhibit C).

Dated: March 9, 1987

JAMES J. GARRETT
GORDON P. ERSPAMER
MICHAEL F. RAM
THOMAS C. VINJE
MORRISON & FOERSTER

By
Gordon P. Erspamer

Attorneys for Plaintiffs

NOTICE OF DISCOVERY OBLIGATIONS
(NARS v. TURNAGE)

In connection with a lawsuit entitled National Association of Radiation Survivors v. Turnage, et al., No. C83 1861 MHP, the District Court for the Northern District of California has ordered the Veterans Administration to circulate a notice to all employees of the Veterans Administration "setting forth the obligations of attorneys and litigants, including employees of litigants, in the preservation of evidence, the giving of testimony and cooperation in pending litigation, so as to avoid unnecessary delay or expense and prevent harassment and other improper conduct." This order was necessitated by the VA's past failure to comply with its discovery obligations.

DISCOVERY OBLIGATIONS

This notice should be read in conjunction with the Notice of Pending Court Action, that notifies you of the pendency of litigation concerning VA adjudication of service-connected death and disability claims based on alleged exposure to ionizing radiation and the $10.00 attorney fee limitation. If you have custody of any papers that concern this litigation, you should not throw them out until the litigation has concluded. We will advise you of the date the action is concluded. If you have any questions whether papers in your custody or other papers of which you are aware are covered by these instructions, you should seek guidance from your supervisors. They will be able to

EXHIBIT A

contact discovery coordinators in their departments or our attorneys to determine the answer to your questions.

The court has ruled that any destruction of papers relevant to this litigation violates the VA's discovery obligations and would subject both the VA and you to sanctions, fines or other penalties. You may be asked to provide papers in order to enable the VA to comply with requests from the plaintiffs in this lawsuit for such documents. If you are asked to provide such papers, or if you are aware of any request of plaintiffs for papers you have, you should provide them promptly to your supervisor or to the discovery coordinator for your department. You should try to provide your supervisors or the discovery coordinators with as much information as possible so that they can comply with any lawful requests for information. The VA attorneys assigned to this case, will be required to circulate such requests so as to ensure that papers called for in the requests are sought from the employees who have the papers, and to institute a system for double-checking to ensure that the papers are received and forwarded to the plaintiffs where appropriate. Compliance with these instructions is therefore important to prevent the VA from being held responsible for destruction of potential evidence.

RELATED OBLIGATIONS

You are advised that this agency will not tolerate any adverse employment action taken against any person for testifying, participating, or otherwise cooperating in any court proceeding, including this case. This includes demotion, reassignment, transfer, change in responsibilities, verbal or other harassment, and any other adverse actions. The court has ordered the VA to inform you that "adverse action of any kind related to an employee's giving of testimony, evidence, or assistance in the litigation is actionable, may constitute a federal offense, and is further in violation of the orders of this court and may be punished by contempt." The court further ordered that this notice advise you that the U.S. Magistrate assigned to this litigation "is empowered to receive complaints of any violation of this aspect of the order." The U.S. Magistrate assigned to this case is Magistrate Claudia Wilken, U.S. District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, FTS 556-5964.

Donald L. Ivers
VA, General Counsel

EXHIBIT A

DISCOVERY PLAN OF VETERANS ADMINISTRATION

Pursuant to the Court's order of January 8, 1987, Donald E. Zeglin, Esq. and Veterans Administration General Counsel Donald L. Ivers hereby submit their "plan for ensuring that discovery requests will be properly circulated and complied with in an orderly manner and a record of discovery provided and documents provided, and a system for doublechecking on employees who are asked to obtain or compile discovery." Transcript of January 8, 1987 Hearing, at 59.

Upon receipt of a discovery request, Mr. Zeglin will distribute a copy of the discovery request to all discovery coordinators designated by the heads of each VA department, staff office, regional office, and federal agency. Each discovery coordinator is to be chosen on the basis of his or her extensive familiarity with and knowledge of the department of staff office's activities, record-keeping capabilities, information-gathering functions, and the physical location of the office's personnel and files, including computer files. Because it is anticipated, based upon prior discovery requests filed in this litigation, that the majority of discoverable material will be produced by the Department of Veterans Benefits (DVB), the Board of Veterans Appeals (BVA), the Department of Medicine and Surgery (DM&S), the Defense Nuclear Agency and other federal agencies covered by the U.S. Magistrate's order dated August 8, 1986 (the "Federal Agencies"), and the VA regional

EXHIBIT B

offices, the following individuals have already been designated as discovery coordinators for those offices:

1. Herbert B. Mars, Deputy Director, Compensation & Pension Service, DVB;
2. Jan Stefan J. Donsback, Special Assistant to the Chairman, BVA;
3. Mansell G. Piper, Director of Administration, DM&S;
4. [List Regional Office coordinators]; and
5. [List coordinators for Federal Agencies].

The heads of the other VA departments, regional offices, Federal Agencies, and staff offices will designate appropriate individuals as discovery coordinators as soon as possible and provide Mr. Zeglin with a resume of their qualifications to serve as discovery coordinators.

Each discovery coordinator is to assist Mr. Zeglin by supervising an orderly search throughout his or her department, regional office or staff office, or federal agency for all discoverable material, by submitting the material to him, and by preparing a record of discovery and documents provided. This record will include an index of all material provided, including notations as to which material is provided in response to which requests; the identities of all employees contacted; and, a description of all locations and files searched. This record will be signed by the discovery coordinator and the head of the department, regional office, Federal Agency, or staff office (or his or her deputy), certifying that all discoverable

EXHIBIT B

material has been provided and will be forwarded with the material directly to Mr. Zeglin.

Mr. Zeglin and his staff will examine the documents to determine the adequacy of the discovery production. In addition, the record of discovery will be reviewed by Mrs. Lynn Covington, Director, Paperwork Management and Regulations Service, Office of Information Management and Statistics, with the assistance of her staff, to assist Mr. Zeglin in determining whether all employees, units, and departments that may have material responsive to the discovery requests have been apprised and requested discovery has been obtained.

As soon as Mr. Zeglin has determined that all discoverable material has been collected, he will prepare and sign the VA's response and present it to Mr. Donald L. Ivers, General Counsel, for his signature. Once signed by Mr. Ivers, the response, indexes and discoverable materials will be forwarded to the Department of Justice for production to the plaintiffs.

EXHIBIT B

NOTICE OF PENDING COURT ACTION

The Veterans Administration is a defendant in pending litigation entitled National Association of Radiation Survivors v. Turnage, et al. The District Court for the Northern District of California, which is hearing the case, has directed the Veterans Administration to circulate a notice "to all employees advising them of the pendency and nature of this action and with specificity the issues involved." The litigation alleges that the $10.00 statutory limitation on the amount of money claimants can pay attorneys for representing them in their claims for VA service-connected death and disability benefits is unconstitutional as applied to "ionizing radiation claimants" on the bases that it prevents the claimants from receiving due process and prevents redress of grievance under the First Amendment. Plaintiffs allege that the VA's process for adjudicating claims for service-connected death and disability benefits by claimants who base their claims on allegations of exposure to ionizing radiation from the atomic bomb tests in the Western United States and the Pacific or from the atomic bombing of Hiroshima and Nagasaki is such that claimants' right to retain counsel at their own expense is constitutionally protected.

The Court has already certified a class of "Ionizing Radiation Claimants" as plaintiffs in this case, and, in its decision certifying the class, described this litigation as involving one fundamental issue: "whether the fee limitation, as applied to ionizing radiation claimants,

EXHIBIT C

violates the due process clause and the First Amendment by precluding them from retaining counsel in connection with their [Service Connected Death and Disability] claims." In addition, the Court found several other factual issues to be important for trial.

> (1) the factual complexity of the underlying Ionizing Radiation Claims; (2) the VA's lack of resources to develop or refusal to develop the facts necessary to establish Ionizing Radiation Claims; (3) the legal complexity of the VA's ionizing radiation regulations and the considerable judgment involved in applying the law to the facts; (4) the radiogenic nature of the diseases and the lengthy latency periods associated with such diseases; (5) the difficulty of locating and obtaining complete medical records for the claimant's period of service; (6) the almost universal need for expert testimony; (7) the need to refute Defense Nuclear Agency dose reconstructions with testimony from qualified health experts; (8) the inability of service representatives to adequately represent Ionizing Radiation Claimants and claimants' dissatisfaction with the services performed by service representative; (9) the difficulty of placing veterans at exposure sites due to inadequate DOD record-keeping; (10) obstacles placed by DOD/DNA to make the claims process more difficult, such as the necessity of submitting a FOIA request to obtain a government dose reconstruction; and (11) the existence of physical disabilities that prevent claimants from prosecuting their claims.

The Veterans Administration and the Department of Justice are defending this lawsuit. In the course of preparing for trial, defendants are required to provide to the plaintiffs information and documents concerning these issues of fact in a process called discovery. The Court issued a protective order requiring the VA to maintain any documents that are relevant to this action, notice of which has already been distributed to you. This notice identifying the issues in this lawsuit should be read in conjunction with the Notice of Discovery Obligations, which sets out the responsibilities of VA employees to comply with their discovery obligations, the Court order and other orders of the Court. If you have any questions concerning how to comply with the Court's orders, do not hesitate to contact your supervisor. Your cooperation is essential in ensuring that the Veterans Administration complies with the orders issued by the Court. For further information contact [list attorney's name].

Donald L. Ivers, Esq.
VA General Counsel

EXHIBIT C

FILE

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE A JOINT MEETING OF THE COMMITTEES ON VETERANS' AFFAIRS REFERENCE DISCOVERY ABUSES IN NATIONAL ASSOCIATION OF RADIATION SURVIVORS (NARS) V. TURNAGE, TUESDAY, MARCH 17, 1987, 9:30 AM, CHOB-334.

MR. CHAIRMAN:

I APPRECIATE THE OPPORTUNITY TO BE HERE THIS MORNING TO HEAR TESTIMONY FROM THE JUSTICE DEPARTMENT, THE VETERANS ADMINISTRATION, AND OTHERS INVOLVED IN ONGOING LITIGATION IN THE CASE OF NATIONAL ASSOCIATION OF RADIATION SURVIVORS V. TURNAGE. HOWEVER, AS RANKING MEMBER OF THE JUDICIARY COMMITTEE AND AS A VETERANS' AFFAIRS COMMITTEE MEMBER I HAVE STRONG CONCERNS ABOUT THE LEGISLATIVE BRANCH INVOLVING ITSELF AT THIS TIME IN A MATTER CURRENTLY BEING LITIGATED.

THE FEDERAL DISTRICT COURT IN CALIFORNIA RULED THAT THE VETERANS ADMINISTRATION INAPPROPRIATELY DESTROYED DOCUMENTS USEFUL IN THE NARS CASE. HOWEVER, THESE DISCOVERY VIOLATIONS WERE ADEQUATELY ADDRESSED BY IMPOSITION OF A PENALTY AS PROVIDED FOR IN THE FEDERAL RULES OF CIVIL PROCEDURE. IN ADDITION, A SPECIAL MASTER WAS APPOINTED TO OVERSEE COMPLIANCE WITH FURTHER DISCOVERY REQUESTS.

I AM CONFIDENT THAT THE V.A. WILL PROMPTLY ADDRESS THE MANAGEMENT AND QUALITY CONTROL PROBLEMS CITED IN THIS DECISION. HOWEVER, I AM NOT CONVINCED THAT THESE PROBLEMS CURRENTLY REQUIRE A CONGRESSIONAL SOLUTION. THE OVERSIGHT FUNCTION OF THIS COMMITTEE IS AN IMPORTANT ONE. NEVERTHELESS, BECAUSE THIS MATTER IS STILL IN THE EARLY STAGES OF LITIGATION, I BELIEVE THAT IT WOULD HAVE BEEN MORE PRUDENT TO HAVE SCHEDULED THESE HEARINGS AT THE CONCLUSION OF THE CASE.

STATEMENT OF SENATOR ALAN K. SIMPSON
JOINT VETERANS AFFAIRS HEARING
MARCH 17, 1987

Thank you, Mr. Chairman. I do appreciate this opportunity to make a statement, although I realize the virtue in keeping these statements short in view of the number of members represented on this joint committee and the necessity to reserve enough time to receive the testimony of the witnesses to appear here today.

Before proceeding with my remarks on this hearing and the purposes for which it is held, I do wish to note that I have seen an advertisement in this morning's Washington Post that presents a distorted viewpoint of benefits available to America's veterans, and which contains a wholly irresponsible personal attack on Chairman Sonny Montgomery. I am offended by it. No one is a nicer friend of mine. Sonny Montgomery is ~~on~~ one of the finest guys in this place. No one is a more tireless advocate for veterans than Sonny Montgomery. A disagreement on one issue of interest to veterans does not justify this scurrilous attack -- one that is sponsored by the National Association of Radiation Survivors, but paid for by an anonymous donor. Such tactics are not the method by which to gain a sympathetic ear from this senator. I think the people that strung that hysterical ad together have totally injured their cause on Capitol Hill and showed themselves as wholly irrational.

I do wish to note for the record that I have reservations about the necessity for and the purpose for this hearing. It would seem to me that allegations that the Veterans Administration has improperly or inadequately dealt with documents required of it in a judicial proceeding are, at this point, best dealt with by the court in which the case of NARS v. Turnage is pending.

In fact, a hearing has already been held in that court, and the judge has made a finding that the Veterans Administration demonstrated a "reckless disregard" for its obligations to provide discovery in the case. However, the judge did not make a finding of any systemic failure on the part of the VA in processing veterans' claims nor did it find "bad faith" on the part of the VA in its dealings with the plaintiffs in the lawsuit.

I certainly cannot in any way support the destruction of documents relevant to a lawsuit, nor can I support or condone alleged retaliatory actions against VA employees attempting to bring forward relevant evidence. Neither can I look with favor on anonymous allegations of improper conduct on the part of the VA. All are equally distasteful.

I trust that the VA is making every effort to investigate instances of alleged harassment of its employees and that it will make a full accounting of its investigation when concluded.

On the underlying issue in the lawsuit, which is the constitutional validity of the ten dollar fee limitation for attorneys representing ionizing radiation claimants before the VA, the court has yet to rule. That, in fact, is the very essence of the case.

It would seem to me to be inappropriate in this forum to receive evidence or make any determinations with respect to that issue.

If the purpose of the hearing is to establish the need for judicial review for those pursuing VA claims, it would seem more appropriate to receive such testimony in the context of hearings on a judicial review bill.

I have supported such bills in the past, and continue to support and cosponsor the judicial review bill in the Senate again this Congress.

I look forward to reviewing the testimony offered today to the extent that it bears on the VA's handling of claims for compensation and benefits for service-connected disabilities. It is proper for this joint committee to manner and whether the merits of those claims are properly assessed.

I would caution that, to the extent the testimony centers around pending litigation, we should exercise caution in dealing with the topic, so as to prejudice none of the litigants in the pending action. It would seem to me that neither the attorneys for the litigants, nor the parties themselves, would be able, at this time, to comment fully on facts which bear on the essence of the case.

We must bear in mind the obvious -- that plaintiffs' claim is disputed by defendants, and it is not our responsibility nor is it within our power to determine the outcome of that lawsuit.

With those cautions in mind, I look forward to reviewing what will develop here today.

OFFICIAL HEARING STATEMENT
SENATOR JOHN D. ROCKEFELLER IV
JOINT HEARING OF THE SENATE AND HOUSE VETERANS' AFFAIRS COMMITTEES REGARDING THE NATIONAL ASSOCIATION OF RADIATION SURVIVORS (NARS) CASE AGAINST THE VETERANS ADMINISTRATION AND ITS PRACTICES AND PROCEDURES RELATING TO ATOMIC VETERANS

March 17, 1987

I wish to commend the chairmen of both the House and Senate Veterans' Affairs Committees, Congressman Sonny Montgomery and Senator Alan Cranston, for holding this hearing today to further examine the questions and issues surrounding what Federal District Court Judge Marilyn Hall Patel has pronounced "a callous disregard for lawful processes" by the Veterans Administration.

The NARS lawsuit originally focused on one issue -- the statute forbidding veterans from paying lawyers more than $10.00 to represent them before the VA. In the process, their lawsuit has possibly uncovered a far more serious and far-reaching problem -- instances in which the VA, while under federal court orders to produce documents vital to the NARS case, may have willfully, and with total disregard for the law, destroyed those requested documents.

Should this be the case, I look upon the VA's action as also showing disregard and disrespect towards our nation's veterans -- especially towards those veterans who were exposed to deadly radiation while participating in the U.S. military atomic testing in the 1940s and '50s.

The discovery of widespread document shredding at the VA has exposed what seems to be an uncaring and sometimes antagonistic attitude on the part of a number of the agency's officials -- officials whose job is to serve and protect the rights and benefits of our nation's veterans. It appears that the VA's formal policy of "productivity control" has placed a greater emphasis on the number of cases processed than on serving the veterans' best interest. The agency's system, which pressures employees to dispose of -- and I use that word deliberately -- veterans' benefit claims, may have led to countless applications being denied with little or no consideration of their content. Perhaps it took too much time to examine the merits of the claims, because the VA "productivity control" policy insisted that claims move off of employees' desks and into "completed" files [redacted]

Further, there are signs that VA quality control policies have been ineffective in preventing and catching these errors, and evidence has even been offered suggesting that VA regional office supervisors doctored or at least misreported error statistics to the VA central office.

Mr. Chairmen, any or all of these alleged practices must be fully investigated. I'm sure you agree that Congress must take whatever action is necessary to ensure that the VA's claims process gives every veteran the fullest opportunity to obtain compensation he or she is owed.

I would like to underscore my view that the plight of the country's atomic veterans has been ignored for far too long -- for some, in fact, it has been forty long years. I believe that we have a special obligation to ensure that the medical and financial needs of these men -- who were never warned of the enormous risks involved in participating in nuclear tests -- are adequately met. In light of their enormous sacrifice and their unquestioning willingness to serve their country, and in the face of the evidence uncovered in the NARS case, these veterans have a right to question whether their concerns are being adequately addressed and to feel mistreated by the Veterans Administration and the federal government as a whole.

In the 99th Congress, I cosponsored the Atomic Veterans Relief Act because I felt strongly that it was necessary to provide immediate relief for veterans who suffer from illnesses linked to radiation exposure, and for their survivors -- especially their children who may have been genetically damaged. When this legislation is reintroduced this year, I will renew my strong support for it and will try to persuade more of my Senate colleagues to do the same.

Let me also say that I continue to feel that Congress should repeal the antiquated $10.00 limit on legal fees. What was obviously an act in the best interest of veterans in the 1860s -- cannot conceivably be seen in 1987 as anything but a restriction on veterans due process rights. In both the last Congress and again in the 100th Congress, I have cosponsored the Veterans

Administration Adjudication Procedure and Judicial Review Act, which would increase the legal fee limit to a point that will enable veterans to obtain legal representation and still be protected from exorbitant legal costs. I recognize that some veterans organizations have some reservations about this legislation, but I am encouraged by their willingness to work with Committee Chairman Cranston and other members of Congress in trying to reach a consensus on this important matter.

I simply believe that all citizens should have the same rights to judicial review of their claims, whether they be veterans, miners with black lung, Social Security or Medicare recipients, or anyone else with a legal grievance of sufficient weight to be entered into court. Judicial review of some nature -- and again, I want to work with the veterans groups on the specifics -- would benefit veterans nationwide.

As we see in the NARS case, the VA is far from error-free. While in most cases, representatives of various veterans groups are more than able to adequately ensure that veterans receive the benefits to which they are entitled, there are rare occasions when a lawsuit filed in court may be the only way to solve a particular question or problem worthy of such action.

Again, I want to thank the distinguished chairmen of both Veterans' Affairs Committees for their deep concerns in this area and their continued strong commitment to veterans. I pledge to continue working with them in all areas affecting our nation's veterans, and I hope that today's hearings will result in constructive efforts to improve the veterans' claim process in general, and the situation for atomic veterans in particular.

PREPARED STATEMENT OF RONALD B. ABRAMS, LEGAL CONSULTANT, VETERANS ADMINISTRATION, BEFORE THE JOINT HOUSE AND SENATE COMMITTEES ON VETERANS' AFFAIRS -- MARCH 17, 1987

Mr. Chairman, and Members of the Committee, thank you for the invitation to appear before you today. I have worked for the Veterans Administration for more than thirteen years. I have a strong commitment to the mission of the agency. Thus, I am gratified that the Committees are jointly taking this opportunity to examine what I and most employees of the Veterans Administration see as the principal question that the agency must confront -- whether it is being fair to the veteran we are here to serve.

Although I have been invited to testify today not as a representative of the Veterans Administration, but as an individual, I want to make clear for the record that I am in fact an official of the Veterans Administration, and the views that I set forth today are based solely on my experience with the agency. That experience, I submit, has some relevance to the areas of the Committees' interests.

For the past 5 years, my work at the Veterans Administration has focused on studying the question of whether the procedures the Veteran Administration employs in handling claims for compensation and pension are in keeping with basic notions of fairness and due process.

As part of my work, I drafted an extensive report entitled

"Procedural Due Process -- Its Application to the Compensation and Pension Program" of the Veterans Administration. This report canvassed the agency's procedures for handling compensation and pension claims and assessed whether they passed muster under the law. In that report, I also made a number of suggestions as to how the agency could upgrade its procedures to ensure greater fairness. This report was approved by the Director of the Compensation and Pension Service, and distributed nationwide. I also prepared a second report, entitled "Compensation and Pension Regional Office Quality As Measured By Central Office Quality Review." This report analyzed over 1700 cases, found a number of deficiencies, and recommended that the agency take corrective action.

All of the work I performed for the past five years, review of case work done in our field offices for quality control purposes, revisions to the operating manual -- the bible that guides all agency employees, and site visits to various regional offices of the VA; were done principally to protect the rights of veterans by making sure that the agency extended to veterans all the procedural protections they are due.

In sum, my role within the agency has been to identify due process problems in handling compensation and pension claims and to offer solutions. For this work, I have regularly been commended by my supervisors at the Veterans Administration, at least up until the time the National Association of Radiation Survivors v. Turnage litigation reached the discovery phase.

It is no secret that I have voiced my concern over the agency's lack of resolve to strengthen its procedures to provide greater protections to the veteran. I did not seek to publicize my concerns, although I had regularly voiced them within the agency. Rather, my statements became a matter of public record because, in the National Association of Radiation Survivors v. Turnage litigation, I was required to give testimony and to turn over the records on due process I have prepared at the Veterans Administration to the attorneys for the plaintiffs. Now that these matters are open to the public, I would like to take this opportunity to share my concerns with the Committees over the inadequacies of the Veterans Administration's procedures.

In my view, there are systemic problems in the Veterans Administration, and they take two forms. First, the agency has not effectively enforced its own regulations relating to the procedures to be used in processing claims for compensation. To those of you who have any doubt that this is the case, I urge you to read the report entitled "Compensation and Pension Regional Office Quality As Measured By Central Office Quality Review." Although it is over a year old, in my view it accurately reflects the situation today.

Second, some of the agency's key directives and regulations need revision -- they need to be fortified to provide greater protections to the veteran, not only to meet minimal constitutional requirements, but to assure fairness. In this regard, I would like to state a personal view, which the Veterans Administration may not share. In my opinion, the agency has a higher duty than other agencies to be fair. Proceedings before the agency are ex parte in nature; the agency operates in what is intended to be a non-adversarial manner, indeed, we are obligated to assist the veteran in developing facts pertinent to his claim; and, as a result, there is no judicial review of agency decisions. Most importantly, we are here to serve heros. The Veterans Administration should not wait for the courts or Congress to force the agency to be fair to veterans. The heros that defended our freedom deserve better treatment.

The sine qua non of fairness is time. It takes time to be fair. It takes time to help the veteran document his claim. And it takes time to process often complex claims fairly. In my judgment, there is an inevitable conflict within the agency. On the one hand, there is a genuine pride and commitment to our mission, and dedication to serving the veteran. On the other hand, however, there is need to process claims in a timely and efficient fashion -- which often takes place at the expense of the due process rights of the veteran. In my judgment, the agency is now regularly sacrificing the procedural rights of veterans on the alter of managerial efficiency. We have, in my view, become singleminded in our pursuit of efficiency at the expense of the procedural rights of the veteran. I urge the Committees to take a careful look at the agency's practices to ensure that they measure up against well recognized constitutional standards.

There is one final point I would like to address. It is also no secret that I have raised concerns about the adequacy of the agency's compliance with discovery requests in the National Association of Radiation Survivors v. Turnage litigation. In my view, the agency's response -- which apparently was to hide documents suggesting due process problems within the agency -- reflects the agency's own doubts about the strength of its legal position. I deplore the agency's acknowledged failure to meet its clear-cut discovery obligations. However, I think that this issue is of secondary importance. The key question that needs to be answered, both here and in NARS, is whether the agency is treating veterans reasonably and fairly. I would hate to see that issue obscured.

I would now be happy to answer any questions the Committee might have.

STATEMENT

OF

BARRY S. BOSKOVICH,
STAFF CONSULTANT
COMPENSATION AND PENSION SERVICE,
DEPARTMENT OF VETERANS BENEFITS,
VETERANS ADMINISTRATION

BEFORE THE

JOINT OVERSIGHT HEARING
OF THE
SENATE AND HOUSE OF REPRESENTATIVES
COMMITTEES ON VETERANS AFFAIRS

CONCERNING

NARS v. TURNAGE

ON

MARCH 17, 1987

Mr. Chairman and members of the United States Senate and United States House of Representatives Committees on Veterans Affairs.

My name is Barry Boskovich and I have been employed by the Veterans Administration since July 1970. I am proud to be a Vietnam Era veteran of the United States Navy, as I am also proud to have worked for veterans at the Veterans Administration for approximately seventeen years. I am honored to have been invited to appear before you today.

As a result of your invitation, I am here as an individual not as an official of the Veterans Administration. I have asked my agency for help in preparation for this hearing but I have been advised that I am on my own. However, I will use the expertise gained by my experience and training at the agency to answer your questions to the best of my ability.

I have been employed by the Central Office of the Veterans Administration in Washington, D.C. since February 1977. I am currently a Staff Consultant in the Compensation and Pension Service, Department of Veterans Benefits. My present position requires that I write directives and procedures that implement laws and regulations dealing with the administration of the Compensation and Pension benefits program. Between 1983 and 1985 I also worked on the Field Operations staff. While there, I conducted twelve survey visits of regional offices and completed staff analyses on most of the VA's fifty-eight offices. I was also responsible for conducting systematic quality control review of compensation and pension cases adjudicated by the regional offices. Part of this review involved determining whether due process had been afforded claimants.

Prior to being promoted to a Central Office position, I worked in the Philadelphia Regional office of the VA. I successfully advanced up the agency career ladder holding the positions of: Veterans Benefits Counselor, Claims Examiner, Senior Claims Examiner (Authorizor), and Supervisory Claims Examiner (Unit Chief). As a Unit Chief, I supervised approximately twenty-two employees who performed all phases of claim processing.

As a result of my review of regional offices, I have developed some concern over the timeliness of claims processing and basic fairness to veterans. At six of the twelve stations I visited, I discovered problems. At certain of these offices, the veteran was not being fairly treated because claims were not being processed according to the VA's own rules. I found a failure by certain offices to promptly control claims, a failure to consider all claims or issues, premature denial of claims without notifying the veteran of the right to appeal, and a refusal to begin the appellate process when the veteran filed a notice of disagreement. I have expressed my various concerns to my supervisors and in various reports I have prepared on my reviews.

These problems are not merely technical in nature but actually lead to harm to claimants. For example, in one case, a veteran's claims were denied twice for failure to provide unnecessary information. The veteran, a former prisoner of war during World War II, was initially requested to provide his service record, when this is generally the responsibility of the VA, and was requested to provide income statements, although income was irrelevant to his claim. The veteran failed to provide this information in the time allowed and thus his claim was disallowed for failure to provide the information. The veteran eventually provided an income statement and the claim was denied a second time on the basis of excess income even though income was irrelevant to the claim. I do not know the present status of this claim or whether the veteran ever received proper review of his claim.

Many of the problems that I identified at the regional offices during the years 1983-1985 continue. In a quality review training letter dated October 8, 1986, Mr. Moore, Director of the Compensation and Pension Service, indicated to the regional office directors that these problems were still being identified. In addition, many of the problems are issues of concern in the NARS v. Turnage litigation. I am willing to answer any questions you may have about these concerns.

My involvement in the NARS v. Turnage case began in July 1986 when I informed my supervisors about the possible destruction of records responsive to document requests in the NARS litigation and the possible non-production of requested documents. I believe then, and I believe today, that doing so was the minimum required by the performance standards for my position.

In late June, I became aware that records were suddenly being destroyed by the Field Operations staff. I was told by Mr. Tomasek, a staff consultant in Field Operations, that Mr. Dunlap's secretary had asked the staffers to clean out the station files. Mr. Dunlap was the Assistant Director of Field Operations. Mr. Tomasek also told me that there was no system to this cleaning of files. Each consultant could decide which documents should be thrown out. Mr. Tomasek later told me that he threw out "everything that stuck to his fingers." Since I had previously worked in the Field Operations staff and knew that some of the historical records were necessary to accurately evaluate a station's performance, I was concerned. As a result of this concern, I alerted my supervisors, Mr. Rice and Mr. Spindle, and talked to Mr. Kenny and Mr. Abrams, my co-workers, and Mr. Tomasek about my concerns. At that time, I was not aware that an anonymous letter had been written to the NARS attorney suggesting that he should request specific records.

Approximately July 7, 1986, I learned that a federal court discovery request had been received by the Compensation and Pension Service. I alerted Mr. Tomasek that a request for documents had been received. It is my belief that documents continued to be destroyed for a time after the conversation. This belief is based on the conversations I had with Mr. Tomasek, Mr. Bissel, another staff consultant in Field Operations, and Mr. Nicholson, the Chief of Quality Review in Field Operations. Mr. Tomasek told me that he had not personally seen the request for evidence. He told me it was a lot of work to clean the files. Mr. Nicholson told me that it was not his business what they were doing in Field Operations. Mr. Nicholson has recently told me that when he testified in San Francisco, he indicated that he too believed records were destroyed by the Field Operations staff after the discovery request was received.

I told my own supervisors, as well as Mr. Nicholson and Mr. Yurgal, other supervisors whom I felt might listen, that I feared that documents covered by the federal court discovery request were being destroyed. I was told by Mr. Spindle to stay out of it since it was not my concern. He also told me the problem should not be discussed with my co-workers. After I talked to Mr. Rice, he told Mr. Kenny and me that he spoke to members of the Chief Benefits Director's Staff about our concerns.

I also became concerned that requested documents were not being produced. Mr. Nicholson told several of us while he was in the process of producing requested documents, "I put my scruples in a jar."

Another incident involved Mr. Foulds, a Field Operations consultant recently transferred from the St. Petersburg Regional Office. Mr. Foulds told Mr. Abrams and me that the St. Petersburg Regional Office used a letter similar to the letter used by the San Francisco Regional Office designed to discourage claimants from requesting a formal hearing, because a formal hearing takes too long and wastes too much time. I later heard from several employees that Mr. Foulds had been verbally reprimanded for giving Mr. Abrams this information. The next day, Mr. Dunlap sent for me. Mr. Dunlap accused me of starting the rumor and making false charges about Mr. Foulds. He then told Mr. Foulds to tell me that his career had not been threatened because he had given information to Mr. Abrams. Mr. Foulds recited dutifully, in a monotone, "My career has not been threatened." Mr. Spindle later told Mr. Yurgal, Chief of Projects, Adjudication Procedure, that he knew I had been "set up" (falsely accused). Later I learned from Mr. Abrams that Mr. Hickman, Assistant Director for Policy Review, testified in San Francisco that the information on the St. Petersburg hearing procedures had not been produced in the NARS litigation.

During the course of depositions taken in the NARS case, I was identified by Mr. Tomasek as someone he had talked to about the destruction of records. As a result, I was asked to give two depositions and to testify at a hearing in San Francisco in the NARS case, as an official of the Veterans Administration.

After my first deposition, I was given the opportunity to correct the transcript of my deposition. Mr. Zeglin, the Deputy General Counsel of the VA, told me to be absolutely certain I could prove everything I said. As a result, I revised some of my statements to soften points that I knew to be true but could not independently corroborate. Because of the changes, I was requested to give a second deposition.

On the night before my second deposition was taken, Mr. Zeglin, called me at home to tell me the deposition would be in Washington rather than in San Francisco. He also told me I should be very careful how I answered the questions in my deposition. He said, "You may not know this, but you are the chief witness against the government."

Subsequently, I found two files that I thought should be identified to those who were compiling the documents responsive to the NARS request. One file was called "NARS" and the other was called "Due Process." The "NARS" file contained historical information about the implementation of the procedures in response to the NARS injunction. It also contained notes Mr. Nicholson made from a conversation with Mr. Zeglin. The "Due Process" file contained information about hearings. There was a letter to the Reno office telling them not to use their form letter to inform veterans of the right to a hearing because the letter actually discouraged hearings. There were also comments made by Mr. Donsback, legal adviser at the Board of Veteran Appeals, which indicated that too many appeals had to be remanded to the regional offices for additional action because the offices had not granted hearings.

My immediate supervisor, Mr. Rice, asked me to inform my second-level supervisor, Mr. Spindle, and Mr. Hickman, in writing that I had found the files. After I did so, I was reprimanded by Erin Orr, one of Mr. Hickman's staff members who was collecting evidence to be submitted for NARS. She told me to

"Stay out of this, you don't know what this is about." In addition, I was called into Mr. Spindle's office and told by him that I had been warned to stay out of it, but I was now involved. He told me not to put anything else about the case in writing. If I found any other documents or sources of information, I was to inform him and he would decide whether to pass it on. I was also told to refrain from talking with or eating lunch with Mr. Abrams. Mr. Spindle told me I needed to make new friends. I told him I was concerned about the VA but he said I should be more concerned about my wife and family. He didn't explain what he meant. I don't believe that Mr. Spindle was personally making a threat, but I do believe he was sending me a message of what had been discussed by his supervisors. Mr. Spindle told me that at a recent staff meeting held by the Director of the Compensation and Pension Service, one or more supervisors lead by Mr. Dunlap, indicated that involvement in the NARS discovery process should have a negative effect on my evaluation, as well as on those of Mr. Kenny and Mr. Abrams.

Mr. Spindle also told me at that meeting how to answer questions at the federal court hearing in San Francisco. Mr. Spindle told me to answer only yes or no. He also told me to answer only the specific question asked. He gave me an example: if asked, "Was the world round," I was to say, "No," because the world is not round, it is spherical.

I was also frightened because Mr. Kenny told me he had previously received a death threat typed on government bond. He told me he did not know for sure why he had received it. I was also concerned because after his testimony in San Francisco, Mr. Abrams was given a drawing of a swastika inside of a Star of David by Mr. Wheeler, the former Adjudication Officer of the

Washington Regional Office. I am not aware whether any action was taken against Mr. Wheeler, although Mr. Abram's supervisors were informed of this incident.

Throughout the case, I informed the office of the General Counsel and the Justice Department of my concerns that evidence requested by discovery was not being submitted and that I was being harassed for identifying records. I told Mr. Zeglin and Ms. Cadieux of the Justice Department that I knew that many staff members had documents that should be submitted but none of us had been officially asked to furnish documents. I also informed her of the two files I had found. Ms. Cadieux told me to give her the two files and I did.

Mr. Abrams, Mr. Kenny, and I have been told by Mr. Spindle that we are now having a portion of our work, some of which refers to "due process," reviewed by Mr. Hickman's staff and occasionally by Mr. Dunlap, personally. While there is no prohibition against this procedure, this review by other peers and supervisors has not happened before.

I have always been and I will continue to be a loyal employee of the Veterans Administration, an agency that is dedicated to serving veterans, their spouses, and their children. We do not manufacture automobiles, refrigerators, or widgets. We serve the nation's veterans. I am not an attorney and cannot give you all the legal reasons "due process" should be granted to claimants, but I do know what is reasonable and fair. Veterans, spouses, and children must be given a fair shake to get benefits, especially when it does not require an undue burden on the agency. I hope that my statement here today will further this goal.

This concludes my prepared statement, Mr. Chairman. I would be pleased to answer questions at this time.

Statement of Thomas J. Kenny

before

a

Joint Oversight Hearing

of

the Committee on Veterans' Affairs
U.S. House of Representatives

and

the Committee on Veterans Affairs
U.S. Senate

March 17, 1987

Mr. Chairman and members of the committee, my name is Thomas Kenny and I am a Staff Consultant employed by the Veterans Administration (VA). I have been an employee of the VA since June 1974 and have been a Staff Consultant since March 1978. I am proud to have served veterans during the 12 years I have been employed at the VA.

I am honored that you have invited me to testify about the failure to comply with discovery requests in the case of NARS v. Turnage and about the VA's responsibility to provide veterans with due process in the adjudication of claims.

At your request, I am here as an individual and not in my capacity as an employee of the Veterans Administration. Any knowledge that I may have about the matters of interest to the Committee is, however, a result of my being an employee of the Veterans Administration. I asked the VA General Counsel's office the legal difference between appearing as an individual as opposed to appearing as an employee. The General Counsel's office advised me to consult my own attorney.

The Failure to Comply With Discovery Requests

I did not have any responsibility for providing VA documents in response to discovery requests in the lawsuit. I did not conceal or destroy any such documents and I was neither directed to nor asked to conceal or destroy any such documents. I did not see anyone destroy any such documents. As I indicated in my deposition in the case and in my court testimony, my knowledge of these matters in this case is second hand. As rumors developed about the situation, I did have conversations with other VA employees, but what I heard was second hand.

Due Process for Veterans In the Adjudication of Claims

Since I am not a lawyer, I can't really talk about due process in a technical legal sense. I can tell you what I know from my experience about problems with claims adjudication.

To put my information in perspective, I need to mention briefly my history with the VA:

- During my first years at the VA, I was an Adjudicator and then a Senior Adjudicator in the Los Angeles VA Regional Office. These jobs involved examining cases to assure that we had properly followed the laws, regulations and instructions in allowance and disallowance of claims. These jobs also involved the approval of monetary awards to beneficiaries.

- For approximately two years after that, I was a member of the Policy Staff in the VA central office in Washington, D.C. This position required me to analyze proposed legislation and to make recommendations concerning the VA's position before Congress.

- From May 1980 to the summer of 1985, I worked in the VA central office on the Field Operations' Staff. This job involved analysis of the performance of field stations concerning quality, timeliness and productivity. During this five year period, I also participated in approximately 25 site visits to stations. These site visits involved comprehensive review of the adjudication operations at regional offices and centers.

- Since the summer of 1985, I have been in my current position which involves the writing and implementation of directives that stem from the laws and regulations concerning the compensation and benefits programs of the VA.

In late 1982, the site visits to stations were expanded to include field personnel and other personnel from the VA central office. The site visits also became much more comprehensive in nature. I want to focus on my experience during the period from late 1982 to the summer of 1985. During this period, I participated in approximately twelve site visits to VA stations throughout the country. The purpose of these visits was to conduct a comprehensive review of the adjudication operations of selected VA regional offices and centers and to gather information concerning quality, timeliness and productivity. Each site visit team prepared a report of its findings after it returned.

I recently reviewed the twelve site visit reports that I helped prepare during this period. I would like to discuss two major problems that are revealed in six of the twelve reports. At these six VA stations, we reviewed a total of 329 cases to check on certain aspects of claims adjudication. As a result of this review, I observed major problems in two areas that I considered to be particularly significant:

- First, 25.2% (83) of the 329 cases reviewed at the six stations had not been put into the computerized case control system as they should have been.
- Second, 10.3% (34) of the 329 cases reviewed at the six stations showed either duplicate controls established and cleared or controls that had been prematurely cancelled.

These figures show that almost 36% of the 329 cases at these six sites had control problems. Let me explain the significance of this as it relates to the adjudication of claims.

The failure to enter cases into the computerized case control system causes delays in handling the cases and makes it difficult for the VA central office to insure that stations are adjudicating cases accurately and properly. Let me explain. The Department of Veterans Benefits has an automated computer system which tracks cases throughout the claims adjudication procedure. When a claim is received, the case is supposed to be placed under the control system within two days after receipt by the Adjudication Division. Using this control system, the Compensation and Pension Service has established procedures to insure the timely processing of claims. Managers are required to review claims that have not been finally adjudicated. The purpose of these reviews is to assure that the case is adjudicated accurately and properly. If a claim is not placed under the control system or if local management decides that it is to its advantage to show a later date of claim than is fact, then management may never have the opportunity to review an "old" case. Also, not placing cases in the control system promptly can create the false impression (once a case is entered into the control system) that a case is being processed in a timely manner.

The clearing of the control is the indication that the adjudication responsibility in the case is completed. Sometimes we found cases that had been cleared from one control and re-established under another. In these cases the station received "credit" for having "completed" a case when the case was not, in fact, completed. By re-establishing the case under a new control, new time lines for action were established. These new time lines would make it appear that the case was being handled timely. Then, when this "new" case would be cleared, the station would get credit for having cleared it. The result: two credits for clearing in what is really the same case. We also found a variation of this process, in which the initial case was "cancelled" rather than "cleared" before being re-established. A cancellation does not result in a credit, so these situations did not eventually produce double credits, but the problem of improper appearance of timeliness would occur, just as in situations where cases had been "cleared" and re-established.

Thus, in summary, when a station clears a control prematurely and re-establishes another, this positively and improperly affects statistical timeliness and productivity. When it improperly cancels a control and re-establishes another, this positively and improperly affects statistical timeliness.

Timeliness and productivity measures can relate to VA employee performance evaluations. Although the VA does not have uniform nationwide performance standards for VA employees responsible for claims adjudication, logic and experience indicate that timeliness and productivity measures are often a factor in evaluating adjudication officers' peformance. Where timeliness and productivity measures are used as a factor in evaluating the performance of VA employees responsible for claims adjudication, those employee evaluations will be distorted if based on inaccurate measures of timeliness and productivity. The case control problems I have described above produce inaccurate measures of timeliness and productivity. Manipulation of these measures overstates individual and office performance.

I have not been on any site visits since the summer of 1985. I do not know what action, if any, the VA has taken since then to correct the problems I observed and to enforce requirements for case adjudication.

This concludes my prepared statement, Mr. Chairman. I would be pleased to answer any questions at this time.

Procedural Due Process-Its Application to the Compensation and Pension Program

SUMMARY

This report was generated as a result of an extensive review of the manner in which procedural due process is accorded to claimants in the Compensation and Pension program. While the report of necessity highlights areas which could be improved, it should be emphasized that the vast majority of regulations and manual provisions adequately protect the procedural due process rights of our claimants.

Four sections of the Code of Federal Regulations were identified for change or elimination. The responsibility of the Veterans Administration to promptly notify claimants, that they have a right, at any time, to a hearing was emphasized. Section 3.105(f) of Title 38 of the Code of Federal Regulations was identified for change. This regulation should be amended to include the opportunity for an adequate notice and a pretermination hearing before pension benefits are terminated. Sections 3.500(v) and 3.655(a) of the Code of Federal Regulations should be changed to ensure that the beneficiary is notified of the consequences of failing to report for an examination or failing to respond to a request for supporting evidence. In addition, section 3.109(b) of Title 38 of the Code of Federal Regulations was identified as a regulation that should be eliminated.

The responsibility of the Veterans Administration to provide procedural due process, even when acting administratively, was stressed. Paragraphs 7.01b, 16.02, 16.03 and 16.04 of the operating manual, M21-1, were identified as paragraphs that should be amended to note the responsibility of the local office to notify the claimant when action is taken to disallow a claim. Paragraph 4.04 of M21-1, was identified as a paragraph that should be changed to include a provision that stresses the responsibility of the local office to document that procedural due process was provided. In addition, it was recommended that the manual be changed to state that no adverse action could be taken for failure to prosecute, unless it could be documented that the development letter in question was of record.

The accountability of our local managers for the quality of the work they perform was emphasized. The enforcement of proper quality standards for all local offices was determined to be a necessary ingredient of a nationwide program that provides procedural due process.

The Compensation and Pension Service has consistently emphasized the importance of procedural due process. In the last year three telegraphic messages dealing with procedural due process were sent to the field. They involved the responsibility of our local offices to honor a request for a hearing, the need to control claims promptly and the error code to assign when doing local SQC if procedural due process was not provided. It was acknowledged that the Veterans Administration has an on-going responsibility to review its procedures to make sure that its claimants receive procedural due process. The Compensation and Pension Service considers this paper a continuation of its efforts to make sure that our claimants receive a fair adjudication of their claims.

TABLE OF CONTENTS

Page
Summary..i
Introduction...1

I. THE LAW...3

  A. Fifth Amendment...3
  B. The Purpose of "Due Process"................................3
  C. The Right to Procedural Due Process.........................4
  D. Case Law..4
    (1) *Goldberg v. Kelly*......................................4
    (2) *Plato v. Roudebush*.....................................5
    (3) *Mathews v. Eldridge*....................................7
    (4) *Bedgood v. Cleland*.....................................7
  E. TRENDS..8

II. THE CODE OF FEDERAL REGULATIONS -TITLE 38.....................10

  A. Introduction...10
  B. 38 C.F.R. 3.103..10
  C. 38 C.F.R. 3.105..12
  D. 38 C.F.R. 3.109..13
  E. 38 C.F.R. 3.500..15
  F. 38 C.F.R. 3.655..16

III. THE OPERATING MANUAL-M21-1..................................17

  A. Introduction...17
  B. M21-1, 4.02..17
  C. M21-1, 7.01 M21-1, 16.03...................................17
  D. M21-1, 16.02...18
  E. M21-1, 16.03...18
  F. M21-1, 18.04...19
  G. M21-1, 16.08, M21-1, 15.11.................................19
  H. M21-1, 14.37d..20

IV. CASE LAW-LAW REVIEW ARTICLES-ANALYSIS TITLE 38.................21

V. DEVELOPMENT RESPONSIBILITIES-NOTIFICATION REQUIREMENT..........26

  A. Introduction...26
  B. Development for Essential Information......................26
  C. Record Purpose Disallowance................................27
  D. Notification after an Administrative Disallowance..........27
  E. Notification-Running Awards................................28

Page

VI. UNREASONABLE DELAY....................................29
  A. Introduction-Analysis................................29

VII. MANAGEMENT EVALUATION SYSTEM.........................31
  A. Need for Enforcement.................................31
  B. Performance Standard.................................31
  C. Recent Example.......................................32

VIII. RECOMMENDATIONS.....................................34

  A. The Code of Federal Regulations......................34
    1. 38 C.F.R. 3.103(c).................................34
    2. Transmittal Sheet 494..............................34
    3. "At Any Time"......................................35
    4. 38 C.F.R. 3.105(f).................................35
    5. 38 C.F.R. 3.109(b).................................36
    6. 38 C.F.R. 3.500(v).................................36
    7. 38 C.F.R. 3.655(a).................................36

  B. The Operating Manual.................................36
    1. M21-1, 7.01b, 16.02, 16.03 and 16.04...............36
    2. M21-1, 4.01g 4.02a.................................37
    3. M21-1, 4.02g, 22.03a(5)............................37
    4. M21-1, 4.04..37
    5. M21-1, 14.37.......................................38
    6. M21-1, 15.11d......................................38
    7. M21-1, 18.04b......................................38

  C. Measurement of Adjudication Divisions................39
    1. Quality and Productivity...........................39
    2. Analysis of 20 Stations............................39
    3. Quality Levels.....................................41
    4. Validation-Performance Standards...................41
    5. Accurate Quality Levels............................42
    6. Control Errors.....................................42
    7. Cost of Recommendations............................42
    8. The National Interest..............................43
    9. Cracks in the Wall.................................43
    10. Coordination......................................43

INTRODUCTION

The thesis of this paper is that in order for the Veterans Administration to comply with the requirements of procedural due process a quality product must be produced. A quality product for adjudication purposes has three elements. First, a claim should be processed in a timely manner. Second, the applicable regulations and manual provisions should be followed throughout the entire adjudication process. Third, it should be documented that the claimant was given a reasonable explanation of the adjudicative decision and that this letter provided, to the claimant, notice of his or her appellate rights.

It is essential that all our managers realize and accept that their compliance with the requirements of procedural due process may slow the adjudication process. Shortcuts to end product credit that abuse the procedural fairness of the adjudication procedure are not acceptable.

This paper takes a catholic approach, looking at the entire program rather than isolating and analyzing just one specific procedure.

In connection with procedural due process, the Compensation and Pension Service should provide regulations and manual provisions that are fair and feasible. Feasible in this context means a procedure that does not put an unnecessary burden on this agency.

This paper will identify regulations and manual provisions that need to be considered for change. Recommendations will be made. In addition this paper will present the position that the VA has a "higher duty", than other agencies, to provide procedural due process because of the non-advisory nature of its proceedings.

I. THE LAW

A. The Fifth Amendment

The fifth amendment to the Constitution provides in part, that "no person shall be deprived of life, liberty, or property, without due process of law." Historically this Amendment was explained in decisions in cases brought by the government against criminal defendants. The concept of due process has evolved. Today this concept has become a potential limitation on virtually all forms of government action involving individuals.

B. The Purpose of "Due Process"

Procedural due process seeks to insure the accurate determination of decisional facts, and informed, unbiased exercises of official discretion. To the extent procedural safeguards achieve these ends, they reduce the likelihood that persons will forfeit important interests without sufficient justification. O'Bannon v. Town Court Nursing Center 447 U.S. 773 (1980).

C. The Right to Procedural Due Process

The Supreme Court has never developed any single principal that can be used to guide particular decisions. The court will enunciate a principal in one case and then reject it in another. (See Davis, Administrative Law Treatise 343, 11:22d. ed. 1979.)

In order to apply the concept of procedural due process to the Compensation and Pension Program we must examine relevant case law, law review articles and analyze in detail the provisions of the laws, regulations and manual provisions that govern the operation of the compensation and pension program.

D. CASE -LAW

(1) Goldberg v. Kelly 397 U.S. 254 (1970)

- The Court determined that welfare benefits are a matter of statutory entitlement for persons qualified to receive them and procedural due process is applicable to their termination.

The interest of the recipient to uninterrupted receipt of Public Assistance, which provides him with essential food, clothing, housing, and medical care, coupled with the State's interest that his payments not be erroneously terminated, clearly outweigh the state's competing concern to prevent any increase in its fiscal and administrative burdens.

A pre-termination evidentiary hearing is necessary to provide the welfare recipient with procedural due process. The claimant must get timely and adequate notice detailing the reasons for termination and an effective opportunity to defend himself. The decision maker must be impartial. He should not have participated in making the determination under review.

(2) Plato v. Roudebush 397 F. SUPP. 1295 (1975)

The District Court determined that the interest of the veteran and the veteran's widow in receiving continued pension benefits under laws administered by the Veterans Administration was an interest in "property" within the meaning of the due process clause. The Court stated that Veterans' widows are entitled, under the due process clause, to notice and a pre-termination hearing before benefits may be terminated or reduced.

It should be noted that the Court emphasized that the due process clause does not guarantee error-free government; it merely assures reasonable procedural protections, applicable to the fair determination of the particular issues presented in a given case. However, the Court went on to say that even in instances where a hearing is not mandated, the Veterans Administration must give adequate and timely notice of the reduction, termination or suspension to the pensioner. The notice should be in writing and it should describe the change, the effective date of the change and the reason for the change. The pensioner should be informed of the procedures for challenging the change and that a prompt hearing will be afforded if one is requested.

The Court stated that in those instances in which a prior hearing is not required, the notice of the change in veteran's benefits should be sent either prior to the effective date of the change, or at the very latest contemporaneously with the change. In those instances in which a hearing is required before a reduction, termination, or suspension, notice should be given long enough in advance to permit a fair opportunity for the beneficiary to request and to have a hearing.

(3) Mathews v. Eldridge 424 U.S. 319 (1976)

In this case, the Supreme Court used a balancing test to determine the requirements of due process. The Court said it would consider the following factors, first the private interest that would be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.

(4) Bedgood v. Cleland No. 4-80-596 (1982)

The United States District Court in Minnesota, held that the issues decided in Plato v. Roudebush had been litigated and apply to the Bedgood case. The Court further held that the plaintiff in this case was part of the nationwide class* as earlier certified in the Plato case. This Court excepted three specific areas from the pre-termination hearing requirement. First the Veterans Administration may immediately act when its action is based upon mere application of numerical standards to clear, written statements of facts,

*Holding of the Court limited to Minnesota.

made by the beneficiary, to the Veterans Administration, with knowledge, or with notice that such statements of fact would be used to calculate benefits, provided that the beneficiary's statement and facts are accepted as true and that such statements of fact, standing alone, are conclusively determinative of the beneficiary's pension entitlement. Second, the Veterans Administration may immediately act when its action is based upon reliable information from which it reasonably appears to the Veterans Administration that the pension beneficiary has died. Third, the Veterans Administration may immediately act when it's action is based upon the beneficiary's failure to return the annual income questionnaire.

E. TRENDS

In 1974, a divided Supreme Court held that a nonprobationary federal employees was not entitled to a hearing prior to removal from the service, if he were given a hearing at a later time. Justice Rehnquist, writing for the Court stated that anyone accepting a job accepts the procedures for dismissal. The employee, according to Justice Rehnquist must accept the "bitter with the sweet". See

Arnett v. Kennedy 416 U.S. 134 (1974). In March 1985, the Supreme Court specifically overturned Arnett in Cleveland Board of Education v. Loudermill. The Court held in a six to three decision, that a civil servant did have the right to a hearing before his employment was terminated, (Justice Rehnquist dissenting). The Court described civil service employment as a property right coming under the due process protection of the Fifth Amendment.

It is apparent that the current Supreme Court follows the majority line of cases, expanding the definition of property rights and viewing "due process" as a limitation on all forms of government action involving individuals.

II. THE CODE OF FEDERAL REGULATIONS-TITLE 38

A. INTRODUCTION

Many provisions in Title 38 of the Code of Federal Regulations, have a direct impact on the responsibility of the Compensation and Pension Service to present a program that provides procedural due process. In this paper, the most important of these regulations will be analyzed in detail. The following Code of Federal Regulations citations all have some bearing on procedural due process: 38 C.F.R 3.103, .105(f), .109(b), .114(b), .151, .155, .158, .160(e), .329, .400 .401, .402, .403, .404, .500, .500(v), .501, .501(e), .501(h) and .655.

B. DUE PROCESS - PROCEDURAL AND APPELLATE RIGHTS WITH REGARD TO DISABILITY AND DEATH BENEFITS AND RELATED RELIEF-38 C.F.R. 3.103

Section (a) of this regulation states that proceedings before the VA are ex-parte in nature. The obligation of the Veterans Administration to assist the claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government, is emphasized.

Ex-parte means a judicial proceeding taken or granted for the benefit of one party only. Practically, this means that the VA is not the adversarv of the claimant. Therefore proceedings before the VA are "nonadversary" in nature.

Section (c) of this regulation states that upon request a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of 38 C.F.R. Part 3. The purpose of such a hearing is to permit the claimant to introduce into the record, in person, any evidence available to him which he may consider material and any arguments and contentions with respect to the facts and applicable law which he may consider pertinent.

Section (e) of this regulation states that the claimant will be notified of any decision affecting the payment of benefits or granting relief. Notice will include the reason for the decision and the date it will be effectuated as well as the right to a hearing. The notification will also advise the claimant of his right to initiate an appeal by filing a notice of disagreement which will entitle him to a Statement of the Case for his assistance in perfecting his appeal. Further, the notice will advise him of the period in which an appeal must initiated and perfected.

All regulations pertinent to the Compensation and Pension Service must be interpreted in light of the last sentence of 38 C.F.R. 3.103(a). This sentence states, this principle and the other provisions of this pargraph apply to all claims for benefits and relief and decisions thereon within the purview of VA regulations 3.1 through 3.1612 inclusive.

Because proceedings before the VA are ex-parte (non-adversary), the Veteran Administration has a duty beyond that of other agencies to adjudicate claims in a fair manner, making sure that the claimant understands and is notified of all decisions taken in connection with a claim.

C. REVISION OF DECISIONS, 38 C.F.R. 3.105

Section (f) of this regulation states that where a reduction in evaluation is considered warranted because of a change in non-service-connected disability and the lower evaluation would result in a reduction or discontinuance of pension payments currently being made, the award will be reduced or discontinued effective the last day of the month in which reduction or discontinuance of the award is approved. The decision in the Bedgood case (see Bedgood v. Cleveland, Supra), indicates that before the VA can terminate pension benefits, the beneficiary must be afforded timely and adequate notice detailing the reasons, effective date and review procedures for the proposed reduction, termination or suspension, and an opportunity for a hearing. The court in Bedgood noted 3 specific exceptions. (These exceptions were mentioned is the earlier discussion of the Bedgood case). Therefore 38 C.F.R. 3.105(f) should be amended so that it conforms with the Bedgood decision. The languague used in M21-1, 14.36 should be incorporated into 38 C.F.R. 3.105(f)). (The Court and the VA, in the Bedgood case, agreed that a change to the manual was an acceptable solution).

D. TIME LIMIT 38 C.F.R. 3.109

Section (a) of this regulation states that if a claimant's application is incomplete the claimant will be notified of the evidence necessary to complete the application. If the evidence is not received within one year from the date of such notification, pension, compensation or dependency and indemnity compensation may not be paid by reason of that application.

Our current procedures involving development should be changed so that the claimant is notified concurrently with the request for information that without the requested evidence no further action regarding the claim can be taken.

Section (b) of this regulation states that failure to furnish a potential claimant any form or information concerning the right to file a claim for pension, compensation or dependency and indemnity compensation, or to furnish notice of the time limit for filing of a claim or a submission of evidence will not extend the periods allowed for these actions.

An opinion by the General Counsel dated April 26, 1982, called 38 C.F.R. 3.109(b) legally objectionable and recommended that it be deleted. (This regulation as are all regulations, had been previously approved by the general counsel). This regulation is inconsistent with the established principle of administrative law that, "An agency is bound by its own regulations". (See note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629 (1974)). Section (b) of 38 C.F.R. 3.109 is subject to attack on constitutional grounds. While due process is a flexible concept, it generally involves notice and an opportunity to be heard before final deprivation of a constitutionally protected right, (Goldberg v. Kelly, 397 U.S. 254 (1970)). An Agency's failure to follow its own regulations especially those which extend procedural rights to individuals, voids any administrative action and is a denial of due process. (See N. L. R. B. v. Pincus Bros. Inc-Maxwell, 620 F. 2nd 367, and United States v. Leachy 434 F. 2nd 7,10).

E. REDUCTIONS AND DISCONTINUANCES - 38 C.F.R. 3.500

Section (v) of this regulation states that when there is a failure to furnish evidence the award will be reduced date of last payment where the evidence requested to continue entitlment is not furnished. At the present time the Veterans Administration does not warn beneficiaries that benefits may be reduced or discontinued if certain evidence is not received.

F. FAILURE TO REPORT FOR VA EXAMINATION - 38 C.F.R. 3.655

Section (a) of this regulation states that when a veteran without adquate reason fails to report for a VA examination, the award to the veteran and any dependents will be discontinued. (Exceptions are cases involving static disabilities or prestablization ratings.) It should be noted that the Veterans Administration does not tell a beneficiary that if he fails to report for a review examination benefits may be terminated or reduced.

III. THE OPERATING MANUAL, M21-1

A. Introduction

Several sections of M21-1, have a direct impact on procedural due process. This Paper will discuss some of these sections in detail. The manual provisions having an impact on procedural due process are as follows: M21-1, 4.01, 4.02, 4.02g, 4.03, 7.01, 7.01a(2), 7.01f, 7.01b, 7.01d, 7.02b, 9.03, 9.04, 9.08a(2), 14.36, 14.37d, 15.11, 16.03, 16.02b, 16.08, 16.06a, 18.02, 18.04, 18.20c, 26.05, 26.13 32.16, 36.02b, 50.31 and 55.14.

B. CLAIMS PROCESSING, M21-1, 4.02

Section a of this paragraph states that all sources from which information may be elicited should be thoroughly developed prior to making decisions affecting entitlement. Also see 38 C.F.R 3.103(a).

C. EVIDENCE REQUESTED FROM CLAIMANT, M21-1, 7.01 and FAILURE TO PROSECUTE CLAIM M21-1, 16.03.

Paragraph b of M21-1, 7.01, states that evidence will be requested to be submitted promptly and a control established for 60 days from the date of the requesting letter. If evidence essential to adjudication is not received within the control period, the claim may be administratively disallowed for failure to prosecute, WITHOUT NOTICE TO THE CLAIMANT!!. Please note that section a(2)(b) of M21-1, 7.01, states that in each instance in which there is a time limitation for submission of the requested evidence, the claimant will be informed that failure to furnish evidence within the applicable statutory time limit may result in the disallowance of the claim. However it should be noted that those claims are disallowed prior to the one year statutory time limit provided under 38 C.F.R 3.655 and 38 C.F.R 3.109. In fact section (f) of 38 C.F.R 3.655 states that a claimant's failure to cooperate in providing essential information is adequate reason to deny entitlement or to discontinue an award of benefits. However, this paragraph does not provide for notice to the claimant. (See 38 C.F.R 3.103(e) and M21-1, 14.36)

D. TYPES OF DISALLOWANCES - WHEN REQUIRED, M21-1, 16.02

Section b of this paragraph states that screen 504 is prepared when administrative disposal of a pending initial or reopened claim does not require notification of the disallowance. It is generally used when there has been a failure to prosecute as explained in paragraph 16.03, or upon death of a claimant prior to an award or disallowance on a pending claim.

E. FAILURE TO PROSECUTE CLAIM - M21-1, 16.03

Section a of this paragraph states that when evidence has been requested from a claimant whose claim is in a pending status and the required evidence is not submitted within the control period, a record purpose disallowance will be prepared. The operating manual (M21-1, 7.01b, M21-1, 16.02 and M21-1, 16.03) directs authorization to deny a claim prior to the one year period established by 38 C.F.R 3.655 and 38 C.F.R 3.109 without any notice to the claimant. These manual provisions contravene the intent and the specific directions of 38 C.F.R 3.103.

F. TIME LIMITS ON SUBMISSION OF NOTICE OF DISAGREEMENT - M21-1, 18.04

Paragraph a of this section states that notices of disagreement must be filed within one year from the date of the letter of notification of the result of initial review or determination. (However, see 38 C.F.R 3.109(b) dealing with time limits for filing evidence.)

G. NOTIFICATION LETTERS, M21-1, 16.08 and M21-1, 15.11

Paragraph 16.08d of M21-1, states that whenever action is taken to disallow a claim based upon a determination of nonentitlement, the claimant and all interested persons will be furnished a sufficient explanation to enable the recipient to understand the reason(s) for the action taken. The claimant will also be informed of the right to appeal. (In most cases, Target-generated disallowance letters meet these requirements.) When circumstances require however, this section of the manual directs that a dictated letter will be used and the necessary entry made on the 501 screen in the letter suppressor field.

The chapter of the operating manual dealing with award notice letters, M21-1, 15.11, does not direct authorization to explain to the claimant the reasons for the action taken. It should be noted that in some cases an award of compensation benefits at a certain percentage level would not meet the expectations of the claimant. In addition the same decision will grant some benefits and deny others. The manual, M21-1, 15.11, should be amended to include language similar to M21-1, 16.08d.

H. DUE PROCESS IN INCOMPETENCY DETERMINATIONS M21-1, 14.37d

This paragraph directs that written notice of a proposal to rate a beneficiary incompetent be sent to the Chief Officer of the institution rather than to the beneficiary prior to the formal decision. The beneficiary would receive oral notification. Until a beneficiary is formally declared incompetent by the VA or a court of competent jurisdiction, written notice as directed by the rest of this paragraph (M21-1, 14.37) should go to the beneficiary, in addition to the oral notification presently mandated.

IV. CASE LAW, LAW REVIEW ARTICLES AND ANALYSIS OF TITLE 38 OF THE CODE OF FEDERAL REGULATIONS

Davis, in his Administrative Law Treatise 343, 11:2(2nd edition 1979), Friendly in Some Kind of Hearing, 123 U. Pa. L. Rev. 1267(1975), and Mashaw in The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v Eldridge, Three factors in search of a theory of value, 44U.Ch. L. Rev. 28(1976), conclude that the right to certain procedural safeguards depends on the importance of the personal interest at stake. There is a difference in the procedural safeguards applied when government is taking action against a citizen and when government is denying a citizen's request. Sometimes a "sliding scale" concept is used based on the seriousness of the deprivation and the strengths of the individual's interest or expectation. At a minimum the government must give an individual notice of the case against him and the opportunity to meet it. (See Joint Anti-Fascist Refugee Committee v. McGrath 341 U.S. 123 (1950)). A concern for procedural fairness must be evidenced. Government action should not deprive an individual of a protected interest without some kind of hearing. However, if the government procedure is fair and there is an opportunity for a hearing then the government action should be upheld. THE PROBLEM IS TO DEVISE PROCEDURES THAT ARE BOTH FAIR AND FEASIBLE.

In the past 30 years the Supreme Court, has held that the following interests are entitled to some type of due process hearing prior to government action: (1) Wages and salary, (2) personal property, (3) teacher tenure, (4) parole, (5) probation, (6) public employment, (7) public assistance, (8) public utility service, (9) driver's license, (10) school attendance, (11) disability compensation, and (12) transfer from a prison to a mental hospital. (See (1) North Georgia Finishing, Inc. v. DI-Cheminc., 419 U.S. 601 (1975), (2) Fuentes v. Shagvin 407 U.S. 67 (1972), (3) Perry v. Sindermann 408 U.S. 593 (1972), (4) Morissey v. Brewer 408 U.S. 47 (1972), (5) Greenholtz v. Nebraska Penal Inmates, 442 U.S. (1979), (6) Elrod v. Burns, 427 U.S. 347 (1976), (7) Goldberg v. Kelly, 397 U.S. 254 (1970), (8) Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978), (9) Bell v. Burson, 402 U.S. 535 (1971), (10) Goss v. Lopez, 419 U.S. 565 (1975), (11) Matthews v. Eldridge, 434 U.S. 319 and (12) Vitek v. Jones, 445 U.S. 480 (1980.)

Basically all the commentators agree that the dictates of due process are "flexible". For example, in Morissey v. Brewer, 408 U.S. 471 (1972), the concept of flexible due process was applied to a parole application. In addition, in Goss v. Lopez, 419 U.S. 565 (1975), the court stated that "No hearing was necessary if the "student" was an ongoing threat to school property or to the academic process". Judge Friendly (Judge, United States Court of Appeals for the second circuit), suggested that in order to assure a fair hearing some of the following elements must be present: 1. An unbiased tribunal; 2. notice of the proposed action and the grounds asserted for it; 3. an opportunity to present reasons why the proposed action should not be taken; 4. right to call witnesses;5. right to know the evidence against one; 6. right to have the decision based only on the evidence presented; 7. right to counsel; 8. right to a written record of the proceeding; 9. a statement of reasons by the decision-maker; 10. A hearing open to the public and 11. judicial review.

Both Professor Davis and Judge Friendly concede there is no constitutional mandate requiring the use of the adversary process in administrative hearings, but there are few if any decided cases which substituted a different method of assuring procedural fairness. This is very important in the context of considering Veterans Administration procedure. VA procedure is a non adversary process where, at no time, does the Veterans Administration become the opponent of the claimant. The ex-parte nature of the Veterans Administration process, the decisions in the Kelly, Plato, Mathews, and Bedgood cases and our regulations support the contention that we in the Veterans Administration have an increased duty to act fairly with our claimants.

There are several cracks in the wall protecting our claimant's procedural due process. For example, 38 C.F.R. 3.103(c) states that upon request a claimant is entitled to a hearing at any time on any issue involved in a claim. However the claimant is not advised of his or her right to a hearing until after an adjudicative decision has been made.

This subtracts from the nonadversary, or ex-parte nature of our adjudication process.Veterans Administration disability determinations are not just simply medical decisions. These determinations are highly judgmental requiring, at least, the following determinations, (1) the degree to which disease or trauma produced impairments; (2) the functional limitation caused by the impairments; (3) the interaction of age (for pension claims), education and work experience with functional limitations; and (4) the degree to which the functional limitations affect the earning capacity of the individual.

Our rating boards do not make "medical" decisions; they make "disability" determinations. Therefore our claimants should know they have the right to a hearing prior to the final determination so that the decision makers can see the claimant and his reaction to his medical problems. A face to face encounter with the claimant has a substantial positive correlation with the acceptance of the claim. (See Social Security study conducted from December 1970 to May 1971, revealing a twenty percent higher award rate when there were face to face encounters - cited in Mashaw, Supra).

V. Development Responsibilities-Notification Requirements

A. Introduction

As a government agency the Veterans Administration is in a special position. The law (Title 38 United States Code), the regulations (Title 38 code of Federal Regulations) and the operating manual (M21-1) all suggest that this agency, to a greater extent than any other Federal Agency involved with similar adjudicative determinations, favor its claimants. Therefore the courts should be expected to strictly scrutinize the procedures used by the Veterans Administration to adjudicate claims. The interpretations and definitions of procedural due process, must all be interpreted in light of 38 C.F.R. 3.103.

B. Development For Essential Information

Procedural fairness, mandated by the Fifth Amendment to the Constitution of the United States, is not limited to whether or not a pre-termination hearing is necessary. This concept includes the entire adjudicative process. At the very beginning (ie when a veteran or a surviving spouse files an original claim using VA Forms 21-526 or 21-534), the claimant should be notified that there is a right to a hearing at any time on any issue. This statement should be printed on our original applications. Unless our claimants know they have this right, the right will not be exercised. Therefore our applications should be changed to give a notice to the claimant that he or she has a right to a hearing.

C. Record Purpose Disallowances

After an original claim is received, if development for essential information is undertaken, the claimant should be informed concurrentlv with the development that no further action may be taken unless the requested information is received. The current procedures involving record purpose disallowances should be revised. The claimant should be notified, when a record purpose disallowance is taken prior to the expiration of the one year date delineated in 38 C.F.R. 3.109 (a) (1). The claimant should be told that, because essential evidence requested was not furnished, no further action can be taken. This procedure would create a safeguard against improper determinations based on development for unnecessary evidence. This procedure would also be evidence of our desire to provide procedural fairness. In addition when a disallowance is taken, procedural and appellate (due process) rights must be given.

D. Notification After an Administrative Disallowance

The title "Record Purpose Disallowance" should be changed to "Administrative Disallowance". A procedure that has the effect of a disallowance and is called a disallowance, is a disallowance (See M21-1, 16.02b)! Our claimants have the right to be advised of these actions and be notified of their procedural due process rights. For example, a claim for benefits is received. Erroneous development for information that is of record, or development for unnecessary information, is undertaken.

The claimant does not respond because he or she knows that this information is of record. After 60 days the claim is denied under M21-1, 7.01b and M21-1, 16.03. No further action would be taken on this claim. Our claimant was not notified of his right to a hearing, our claimant was not notified of the disallowance and our claimant was not given procedural and appellate (due process) rights. When the Veterans Administration acts to deny claims prior to the one year time limit mandated by 38 C.F.R. 3.109 for reasons of bureaucratic convenience, the "fairness" of the procedure should be strictly scrutinized.

E. Notification-Running Awards

The Veterans Administration should always notify its beneficiaries (those receiving payments), that failure to furnish requested evidence could cause a reduction or termination of benefits. Any action to reduce or terminate a running award should generate an accompanying letter complying with the dictates of 38 C.F.R. 3.103. The consequences of a beneficiary or a claimant failing to report for an examination should be explained when the examination is scheduled.

VI. Unreasonable Delay

A. Introduction

An unreasonable delay in handling claims may violate statutory and constitutional requirements. (See Wright v. Califarno, 587 F.2nd. 345.) Excessive delay may involve a violation of due process even if it does not extinguish the claim in a given case. (See Houston v. Nimmo, 670 F.2nd 1375). The Compensation and Pension Service has established a system to insure the timely processing of its claims. After a period of time our managers are required to review claims that have not been finally adjudicated. For example a unit chief might review a claim that is 90 to 179 days old, a section chief may look a claim that is 180 to 269 days old and the AO or the AAO may look at claims over 270 days old. However, if a claim is not put under control or if local management decides that it is to its advantage to show a later date of claim, then management may never have the opportunity to review an "old" case.

We in Central Office have a responsibility not only to develop procedures that provide procedural fairness, but we should, to the best of our ability, enforce the procedures we establish. Management in Central Office should act to make sure that our regional offices adjudicate claims fairly and provide procedural due process. "Old" claims that are not reviewed because the effective date was changed in

order to improve the performance statistics of local management, violate the constitutional requirement to provide a "fair" adjudication process.Our managers should be aware that they may be individually liable in tort if they are found to have violated clearly established statutory or constitutional rights of which a reasonable person would have known. (Administrative Procedure Act by analogy.)

VII MANAGEMENT EVALUATION SYSTEM

A. Need For Enforcement of Safeguards - Coordination

The procedures of the Compensation and Pension Service, in general, meet the requirements of the Fifth Amendment to provide procedural due process. Most of our procedures are adequate, however the enforcement of these procedures needs to be improved. Our claimant's procedural and appellate (due process) rights should be protected by coordinating enforcement efforts between the Compensation and Pension Service, the three Regions and the Directors of our local offices.

B. Performance Standards

Our managers are required to meet national standards for productivity, timeliness and effectiveness. They are also asked to report their "quality levels". These quality levels are validated by Central Office as part of the statistical quality review process. When a quality level is not validated (to not validate means that the percentage of errors found in Central Office are outside the upper and lower control limits that were statistically established for the number of cases reviewed in the local office), then a critical quality situation as defined in M21-4, 3.15 is declared. However, there is no Central Office directive that the performance standards for our local managers include a requirement that local managers have their reported quality levels validated in Central Office. This can lead to an undue emphasis on productivity.

For example, a local manager may have a performance standard that insists that he show good productivity, effectiveness and timeliness. In addition, he may be required to report quality levels that are at the minimum acceptable level. However, there may be nothing in the performance standard to invalidate the local quality review findings if these findings are not confirmed by Central Office. Therefore this manager might institute local procedures that would encourage the premature denial of claims or the non-control of claims. Once a claim is received, the final action should not be taken until the claimant has a reasonable chance to provide the information requested and the Veterans Administration reviews all the information it is required to obtain.

C. A Recent Example

A recent staff visit to a certain regional office noted problems with procedural due process. The latest Central Office SQC (March/1985), of this office noted that local quality statistics were not validated in any authorization area and in rating judgemental deficiency findings. Although the AO and the acting AAO have to report quality levels that meet a certain level, they are not required to have their quality findings validated in Central Office.

The conclusion is inescapable, the adjudication managers in this office are not encouraged to report their true quality levels. All performance standards for local adjudication managers should include an independent validation requirement. Our managers should be encouraged to produce not only a reasonable volume of work but also to produce this work in a quality manner.

We in Central Office have two basic obligations in regard to procedural due process. First we must promulgate regulations, manual provisions and directives that are fair to the claimant, while protecting the interests of the Government. Second, we must make certain that our local offices follow these regulations, manual provisions and directives. The most effective way to do this is to carefully check the quality of the work being performed in our local offices. Where patterns are identified that reveal violations of procedural due process because of bureaucratic convenience, then prompt efficient action must be taken. Staff visits within the last eight months, to four regional offices noted patterns involving problems with providing and documenting procedural due process.

VIII. RECOMMENDATIONS

A. The Code of Federal Regulations

1. Section 3.103(c) of Title 38 Code of Federal Regulations makes it clear that a claimant is entitled to a hearing at any time on any issue. However our claimants do not know of this right until an adjudicative determination is made. Although this procedure may be proper for other federal agencies, the VA is held to a higher standard. The regulation stresses that a claimant has a right to a hearing at any time. The purpose of the hearing as stated in 38 C.F.R. 3.103 is to permit the claimant to introduce, into the record, evidence and arguments which he considers pertinent. This section of 38 C.F.R. 3.103 coupled with the fact that the adjudication process is non adversary, makes it a necessity that our claimants are notified of their right to a hearing at the earliest possible time. Therefore original application forms should be preprinted with this notice, In addition whenever a reopened claim is filled notice should be given at the earliest opportunity of the right to a hearing.

2. Transmittal sheet 494, dated July 18, 1972, revised 38 C.F.R. 3.103. The purpose of this revision was to place long standing policies and procedures in a medium more available to the public. Apparently before this change the due process policies of this service were in D.V.B. circulars not readily available to the public. In

the course of the revision of this regulation, the General Counsel asked the Compensation and Pension Service to include in subparagraph (c), a statement that a claimant was entitled to a hearing prior to a decision. After some discussion, the words "at any time" were inserted in subaragraph (c).

3. The words "at any time" were used instead of the specific language requested by the General Counsel to ease our administrative burden. Therefore it is suggested that we continue to use the carefully crafted "at any time" language of the regulation when notifying our claimants of their right to a hearing. This language is deliberately non specific. It was intended to reduce the number of hearings requested prior to an adjudicative determination. At a minimum considering the provisions of 38 C.F.R. 3.103(a), the least we can do is to insert this language on our original applications and in the case of a reopened claim, on the first letter we write to the claimant. In addition a beneficiary should always be advised of his right to a hearing, prior to a decision, whenever the VA initiates action to review his benefits. (See the attached transmittal sheet and supporting documents marked exhibit "A").

4. Section 3.105(f) of Title 38 Code of Federal Regulations should be amended to incorporate the language of M21-1, 14.36b. No reduction of benefits other than the exceptions cited in Bedgood should take place without notice and the opportunity for a pre-termination hearing.

5. Section 3.109(b) of Title 38 Code of Federal Regulations should be eliminated. This regulation has been described by the General Counsel as "legally objectionable". As a matter of basic policy, the Veterans Administration should not be unfair.

6. Section 3.500(v) of Title 38 Code of Federal Regulations should amended. Language should be inserted to emphasize that benefits will not be terminated or reduced until the beneficiary is notified that receipt of the requested evidence is essential to the continuation of his benefits.

7. Section 3.655(a) of Title 38 Code of Federal Regulations should be changed. Language should be inserted so that benefits would not be reduced or terminated unless the beneficiary was notified of the resultant consequences of his failure to report for the scheduled examination.

B. The Operating Manual

1. Paragraphs 7.01b, 16.02, 16.03 and 16.04 of M21-1, should be amended. All these paragraphs should direct notification of procedural and appellate (due process) rights whenever a claim is denied for failure to furnish evidence prior to the one year time limit delineated in 38 C.F.R. 3.109.

This change would safeguard the rights of our claimants and insure procedural fairness. It should be emphasized that disposal of a claim prior to the one year time limit, does require notification of the disallowance!

2. Paragraphs 4.01 and 4.02a of M21-1, should be amended to include language that directs authorization to explain the need for the evidence requested and the resultant consequences if the requested evidence is not furnished. This change would provide an additional element of procedural fairness.

3. Paragraphs 4.02g and 22.03a(5) of M21-1 should be amended to make it clear that an administrative disallowance cannot be taken until the claimant is told what evidence is required, the fact that an outside institution or physician failed to furnish evidence, the time limit in which the claimant should provide this evidence and the consequences of the failure to provide the requested evidence.

4. Paragraph 4.04 of M21-1 should be amended to include a subparagraph that would emphasize the responsibility of adjudication to document that procedural due process was provided. This paragraph should also include language that would prohibit an administrative denial for failure to prosecute, unless a copy of the development letter at issue was in the file.

5. Paragraph 14.37 of M21-1, should be amended to include a requirement that in addition to the oral notification provided to a claimant when there has been a proposal to declare him incompetent, a written letter also be provided to document that notice was given.

6. Our Target letter system should be changed. The provisions of 15.11d should be amended to make sure that when development is undertaken concurrently with award action that the development paragraphs must be included as part of the award notification letter. The manual, M21-1, 15.11 should prohibit situations where a veteran receives a letter asking for evidence on Tuesday and a second letter on Thursday telling him his claim has been granted. This misleading procedure is unfair and should not be permitted. The target system should also be changed so that the Printed award or disallowance screen, kept in the file shows whether or not the notification letter was suppressed. At the present time the only way to know if a target letter was suppressed is if the adjudicator annotates the award or disallowance.

7. Paragraph 18.04b, of M21-1, should be amended to extend the time limit for submission of a notice of disagreement when it cannot be documented that the claimant was notified of the action taken. (Former rule 10, 38 C.F.R. 19.110, similar to 38 C.F.R. 3.109(b) was deleted by transmittal sheet 9 to Part 19 of 38 C.F.R.)

C. MEASUREMENT of ADJUDICATION DIVISIONS

1. Our local managers should be accountable for both quality and productivity, Because procedural due process is an integral part of the quality of work performed in our Adjudication divisions, the procedural and appellate (due process) rights of our claimants will suffer if our local managers are not made individually responsible for the validation (verification) of their reported quality levels. It should be noted that a independent, "regionalized system", of initial quality review has been proposed. Before we radically change our current system and spend a great deal of the taxpayers money, we should insist on a general validation criteria in performance standards for all our local managers. If, after a reasonable amount of time, improvement is not realized, then the need for a regionalized system of initial SQC would be apparent.

2. In connection with this white paper, twenty station analyses done in the last year, for larger offices were reviewed. For the purpose of this study, only four of the six SQC areas were considered. The procedural discrepancy validation process for Rating and Authorization actions was not considered. Only the four "important" areas, substantive errors and judgment deficiencies for both rating and authorization were analyzed.

Eighty-five percent of the offices included in this study failed to validate in one important area. Twenty-five percent of these offices failed to validate in 2 of 4 areas. Of the 80 areas, 31 or 38.75 percent did not validate upon Central Office review. Of the 40 rating areas reviewed 22.5 percent did not validate. Of the 40 authorization areas reviewed 55 percent failed to validate.

In December 1984, a Field Director stated in connection with a staff analysis, "All adjudication divisions seem to have a Critical Quality Situation". This study confirms his statement. It is obvious that that we cannot entirely rely on the "quality figures" reported by our local offices.

Twenty Five Percent of the offices failed to validate in three of four areas. An additional twenty five percent of these offices failed to validate in two of the four areas. Overall eighty five percent of the twenty offices had one important area in which they failed to validate.

Although the validation of rating qualify levels was not good, the validation of authorization quality levels was even worse. For example twenty percent of the reported substantive rating error rate quality levels were invalidated. However forty percent of the reported authorization substantive error rate quality levels were invalidated.

3. These figures are striking. It is obvious that we cannot say, for a certainty, what the true quality level is in our local office operations. In order to protect the compensation and pension program, in order to safeguard the fairness of our procedures, and in order to protect the Veterans Administration against constitutional attack, our local quality review procedures should be upgraded.

4. Our management system should be revised so that managers who provide quantity and good quality be rewarded. It should be suggested to station directors, that since DVB Circular 20-84-20 mandates a validation standard for their performance standards, that they insert validation standards into the performance standards for adjudication management.

It is important to note that validation simply is a means to ensure that management reports a true picture of the quality of the work being done in the individual office. It is acknowledged that offices have problems that cannot be corrected overnight or that are sometimes impossible to solve. However, it is our local managers responsibility to report accurately the true level of quality in their office.

The reason quality is so important for procedural due process purposes is that we cannot provide fair service to our claimants unless we give them a quality product. All our regulations, and manual provisions protecting procedural due process mean very little if they are not followed by our local offices.

5. Our managers are pressured to produce, At the present time, it is obvious that they are not reporting accurate quality levels. It has been noted in earlier analysis of Central Office SQC, that claims are not being controlled properly, controls are being canceled unnecessarily, claims are being denied prematurely and in some cases procedural and appellate rights are not being provided. In addition the adjudication process itself is being challenged in Federal Court in Chicago and San Francisco.

6. Several recent analyses of local quality and a White Paper submitted in January 1985, found a significant percentage of "control errors". If a claim is not put under control, if establishment of a control is delayed or if a control is incorrectly cancelled and then reestablished showing a new incorrect date of claim, the regular management review of old cases, established as a safeguard for our claimants, would not be done. The SQC data shows there is a pattern of these control errors.

7. The changes suggested above can be accomplished with minimal cost. Notification letters when record purpose disallowances are processed can be directed by adjudication with a simple push of a button. Applications can be revised the next time they are due to be printed. Notice of the

claimant's right to a hearing can be enclosed as an attachment to original claim forms. The Compensation and Pension Service can begin now to revise M21-4, Appendix D. However we would need the concurrence of the 3 Regions and the Chief Benefits Director to revise the performance standards for our local managers.

8. There is a national interest in providing a benefit system for our veterans. It is the obligation of the Veterans Administration to give fair treatment to those willing to risk their lives for their country. The "tail of productivity" should not wag the "dog" of ultimate performance.

9. At the present time there are a few cracks in the wall designed to protect our claimant's right to a fair adjudication process. These "cracks" can be repaired with minimal cost and the VA will reap maximum benefit.

10. It is suggested that this Service notify the Chief Benefits Director and the three Regional Directors that their help is needed in order to protect key aspects of the Compensation and Pension Program. We should explain that our Program, as it is being currently operated could be attacked on a variety of fronts. First, it should be stressed that the Compensation and Pension Service is acting unilaterally to tighten certain regulations, manual provi-

sions and operating procedures. However we should make it clear that unless some real "teeth" are put into Central Office validation of quality review, it is only logical to assume that our local managers will continue to work to their performance standards. If managers performance standards are based on reported but not validated quality levels, then the efforts of the Compensation and Pension Service to protect the "Program" will not achieve success.

Exhibit "A"

Veterans Administration
Washington, D.C. 20420

July 18, 1972

VA REGULATIONS

COMPENSATION AND PENSION—Transmittal Sheet 494

Remove pages	Insert pages
35-8R and 36-8R	35-9R and 36-9R 36a

Paragraph revised	Paragraphs added	Paragraphs canceled
1103	None	None

EXPLANATION

The purpose of the following comment on the changes included in this amendment of VA Regulations is to inform all concerned why these changes are being made. This comment is not regulatory.

Paragraph 1103. The revision of this paragraph is primarily for the purpose of placing certain longstanding policies and procedures in a medium more available to the public. (Regulatory changes are printed in the Federal Register and are incorporated in the Code of Federal Regulations which is to be found in most well-equipped law libraries, and all depository libraries, and many others.)

The paragraph provides little in the way of substantive change as, for the most part, it has been gleaned from other VA directives. The following comments are furnished generally to reiterate and emphasize.

Subparagraph (A) stresses the point that the VA is not a party to the issues but, in fact, has the same interest as the claimant, i.e., the desire that the greatest benefit to which there is entitlement under the law and facts be authorized. The proceedings are ex parte in nature in that one party brings his contentions and evidence forward and does not face an antagonist. The Court, in an ex parte matter, is not required to accept without question the veracity of the party's allegations nor the probative values he asserts for his evidence. While an antagonist is not present to challenge the evidence and cross examine the witnesses, the Court is under obligation to seek and ascertain the truth of the matter. The VA is in a similar position. It is required to seek the full facts in order that the obligations to the claimant and to the Government are satisfied. This includes an exploration of subordinate benefits to which the claimant has apparent entitlement of which he is unaware.

Subparagraph (B) reiterates a longstanding policy precluding the application of strict rules pertaining to the admissibility of evidence. Thus, hearsay evidence, secondary evidence, or evidence of a nature which might be otherwise objectionable under the strict rules of evidence is freely admissible and is to be granted the credibility and probative value it warrants. This policy is intended as a shield for claimants as they seldom know nor appreciate these niceties.

Subparagraph (C) is also reiteration of longstanding policy worthy of wider public knowledge. Substantive change is not intended. The following comment is offered as informational and advisory. The number of claimants who request a hearing is not proportionately large. From experience the number of hearings requested after a decision far outnumbers those requested in pending claims. Accordingly, it is reasonable to assume that

Exhibit "A"

VA Regulations
Compensation and Pension—Transmittal Sheet 494—Continued

the claimant who requests a hearing is, in general, a disgruntled claimant and one who brings some feeling of antagonism into the hearing room though it may not be manifest. He is a person who believes sincerely in the merit and validity of his claim and feels that he has been unjustly denied. The most effective and certainly the most appropriate counter to such antagonism is an attitude on the part of the VA personnel of friendliness, helpfulness, courtesy and respect. In many instances a full explanation of the issues and an attentive ear are full satisfaction to the claimant.

Subparagraph (D) reiterates longstanding policy.

Subparagraph (E) restates existing practices in general but adds somewhat to the information to be furnished the claimant with regard to his appellate rights.

By direction of the Administrator:

Fred B. Rhodes
FRED B. RHODES
Deputy Administrator

Distribution: RPC: 2210
FD

To KLW 1/20/72
To (013A) 1/20/72
To (212) ~~[illegible]~~ 2/1/72

Exhibit "A"

3/7/72 to (20) per C [illegible] To (20) 4/24/72
3/7/72 to (62) To (02) 4/28/72
4/24/72 back to 21 [illegible] To (02A) [illegible] 5/12/72

SUMMARY SHEET	SUBJECT VA Regulation 1103	FROM DVB (21)	DATE 1972
		NAME OF CONTACT K.L. Walton	EXT. 3955
			ROOM NO. 418

CONCURRENCES								APPROVAL		
TO	SYM.	DATE OUT	SIGNATURE	TO	SYM.	DATE OUT	SIGNATURE	BY	DATE	SIGNATURE
1	(02)	5/11	Corcoran	5				ASST. BA		
2				6				ASSOC. BA	5/19/72	R. H. Wilson
3	Will be printed in Fed Register on 5/18 first time							BA	[illegible]	F B Rhodes
4	Will publish as TG 494 – Printing in Fed Reg								2nd time approp	7/25 [illegible]

PURPOSE - DISCUSSION - IMPLICATIONS
(The write-up under these three headings must cover all items required by [illegible], Part 1, Chapter [illegible], Section [illegible], par. [illegible].)

PURPOSE: To amend the regulation to include the principles of due process and appellate rights applicable to the adjudication of claims for disability and death benefits in order that these may be placed in a medium more available to the public.

DISCUSSION: It has become apparent that while the VA has had a policy for many years which protects the due process and appellate rights of claimants for disability and death benefits, this is not sufficiently a matter of public knowledge. We propose that these principles be included within the regulations in order that they be printed in the Federal Register and that they be incorporated in the Code of Federal Regulations.

The proposed regulations are derived in substance from existing directives of long-standing. A few minor deviations are made for the purpose of providing a claimant a fuller understanding of the issues in his case and of providing greater detail with regard to appellate rights and procedures.

In broad terms these rights are to an adjudication, which is ex parte in nature in that the VA is not an adversary, in which any evidence and argument which the claimant may wish to submit is admissible; in which he may appear personally if he desires, in which he is entitled to representation of his choice at any time during the consideration of his claim, and in which he has appellate rights with full knowledge thereof.

IMPLICATIONS: These proposals in general restate existing policies and should add no undue burden to our operations. Their approval and publication should be welcomed by all concerned with veterans' benefits and should add to the public image of the VA or at least eliminate a potential ground for attack. The liberal policy stated by these proposals and the spirit of helpfulness which they imply should do much to disarm critics of the VA.

It is recommended that the effective date be the date of approval.
[illegible]

DVB circ 20-75-108
20-75-85

Chief Benefits Director
SIGNATURE OF INITIATING OFFICIAL

4/21/72

Exhibit "A".

VA Regulation 1103

DUE PROCESS PACKAGE

The changes in this package are the result of a conversation between Marty Gussow and myself.

This package will be submitted to The Department of Justice with a request by The General Counsel for Department of Justice support in future court cases. In order to bring the point to their early attention that these regulations pertain only to the C&P function the heading has been changed. (Any attempt to write a VA-wide regulation on due process would meet interminable delay. It would be more expeditious and proper for each service to write its own regulation.)

In subparagraph (A) the coverage of the regulation is extended beyond monetary benefits to cover the full area of C&P responsibility. This was at Mr. Townsend's request. The sentence with regard to cross-examinations and impeachment of witnesses was felt by Marty to draw attention to the possibility of cross-examination and impeachment of VA doctors and rating members. It was deemed better to eliminate it.

The General Counsel preferred a statement in subparagraph (C) that a claimant was entitled to a hearing prior to a decision, particularly one reducing or terminating an award. I objected because this would draw general attention to a possibility that could become an administrative monster. Marty admitted this and agreed to addition of the words "at any time". He stated that there was legal objection to the statement that a hearing would be deemed in lieu of a hearing before the BVA because this was not supported by any provision of law and such judgments

Exhibit "A"

were in the jurisdiction of the BVA. I felt there was nothing to be gained by adhering to this point.

In (B) Marty felt the language "authorizing the payment" was not broad enough to cover reductions or terminations. It was easier to change the language than to argue the point. He also felt that the right to a hearing should be included in our notification of decision. As a matter of fact we have included this notice in our proposed appeal paragraph form. Accordingly, we conceded.

Exhibit "A"

COPY "A"

1103 (83.103) [DUE PROCESS - PROCEDURAL AND APPELLATE RIGHTS] WITH REGARD TO DISABILITY AND DEATH BENEFITS AND RELATED RELIEF

[(A) Statement of Policy. Proceedings before the VA are ex parte in nature. It is the obligation of the VA to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the government. [illegible] THIS PRINCIPLE AND THE OTHER PROVISIONS OF THIS PARAGRAPH ~~SHALL~~ APPLY TO ALL CLAIMS FOR BENEFITS AND RELIEF ~~Because the proceedings are not adversary in nature, adversary techniques such as cross-examination and impeachment of witnesses are inappropriate.]~~ ~~WHICH ARE WITHIN THE~~ AND DECISIONS THEREON ~~[illegible]~~ WITHIN THE PURVIEW OF ~~[illegible]~~ VA REGULATIONS 1000 THROUGH 1879 INCLUSIVE.

[(B) Submission of Evidence. Any evidence whether documentary, testimonial, or in other form, offered by a claimant in support of a claim ~~for benefits under any laws administered by the VA governing the payment of monetary benefits to veterans, their dependents, and their survivors,~~ and any issue he may raise and contention and argument he may offer with respect thereto are to be included in the records.]

[(C) Hearings. Upon request a claimant is entitled to a hearing AT ANY TIME on any issue involved in a claim ~~for benefits under laws administered by the VA governing the payment of monetary benefits to veterans, their dependents, and their survivors.~~ WITHIN THE PURVIEW OF ~~[illegible]~~ VA REGULATIONS 1000 THROUGH 1879 INCLUSIVE The VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest his home having adjudicative functions and will provide VA personnel who have original determinative authority of such issues to be responsible for the preparation of the transcript; however, further expenses involved will be the responsibility of the claimant. ~~and a hearing in a case which is pending appellate consideration will be treated in lieu of a formal hearing before the Board of Ve~~

Exhibit "A"

COPY "A" (cont.)

claimant is entitled to produce witnesses and all testimony will be under oath or affirmation. The purpose of such a hearing is to permit the claimant to introduce into the record in person any evidence available to him which he may consider material and any arguments and contentions with respect to the facts and applicable law which he may consider pertinent. It is the responsibility of the VA personnel conducting the hearing to explain fully the issues and to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position. It is their further responsibility to establish and preserve the record. Because of this and to assure clarity and understanding therein, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence and to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by the physician designated by the VA as a participant in the hearing and his observations will be read into the record.]

[(D) Representation. Within the provisions and criteria of VA Regulations 3426 through 3663 a claimant is entitled to representation of his choice at every stage in the prosecution of a claim.]

[(E) Notification of Decisions. The claimant will be notified of any decision AFFECTING THE ~~authorizing the~~ payment of benefits or GRANTING RELIEF. ~~disallowing a claim.~~ Notice will include the reason for the decision and the date it will be effectuated, AS WELL AS THE RIGHT TO A HEARING SUBJECT TO SUBPARAGRAPH (C) OF THIS [illegible]. The notification will also advise the claimant of his right to initiate an appeal by filing a Notice of Disagreement which will

Exhibit "A"

COPY "A" (cont.)

entitle him to A Statement Of The Case for his assistance in perfecting his appeal. Further, the Notice will advise him of the periods in which an appeal must be initiated and perfected. (See VA Regulations 9900 Series on Appeal.)]

Exhibit "B"

CENTRAL OFFICE VALIDATION RESULTS

Name of Office	Date of review	Areas that FTV	Rating Areas FTV*	Authorization Areas FTV*
Atlanta	March 1985	3 of 4	S**	S - J***
Denver	March 1985	all areas validated	———	———
Montgomery	March 1985	3 of 4	J	———
Pittsburgh	March 1985	3 of 4	J	S - J
Hartford	Dec. 1985	1 of 4	———	J
Boston	July 1984	2 of 4	———	S - J
Chicago	Oct. 1984	1 of 4	———	S
Cleveland	Oct. 1984	all areas validated	———	———
Detroit	Feb. 1984	2 of 4	J	S
Houston	July 1984	all areas validated	———	———
Los Angeles	July 1984	3 of 4	J	S - J
Nashville	July 1984	2 of 4	———	S - J
Newark	Dec. 1984	1 of 4	———	J
New Orleans	Feb. 1985	2 of 4	———	J
Philadelphia	June 1984	3 of 4	S	S - J
Phoenix	Feb. 1985	3 of 4	S - J	J
San Diego	March 1985	1 of 4	———	J
Seattle	July 1984	1 of 4	———	———
New York	April 1984	1 of 4	———	J

*Failed to validate

**Substantive

***Judgement

EXHIBIT
247
Plfs' [illegible]

GRAPHIC MESSAGE

NAME OF AGENCY
VACO, WASH D.C.

PRECEDENCE
ACTION P
INFO

SECURITY CLASSIFICATION

ACCOUNTING CLASSIFICATION

DATE PREPARED
2/12/85

FILE

FOR INFORMATION CALL

NAME
RONALD ABRAMS

PHONE NUMBER
2157

TYPE OF MESSAGE
☐ SINGLE ☐ BOOK ☐ MULTIPLE ADDRESS

THIS SPACE FOR USE OF COMMUNICATION UNIT

MESSAGE TO BE TRANSMITTED (Use double spacing and all capital letters)

TO:
ALVARO

FEB 15 1985

00/21 SUBJ: ASSIGNMENT OF QUALITY CODES WHEN THERE IS A FAILURE TO PROVIDE PROCEDURAL AND APPELLATE (DUE PROCESS) RIGHTS

1. QUESTIONS HAVE ARISEN CONCERNING THE ASSIGNMENT OF QUALITY CODES WHEN PROCEDURAL AND APPELLATE (DUE PROCESS) RIGHTS ARE NOT PROVIDED.

2. 38 CFR 3.103(e) STATES, IN ESSENCE, THAT THE CLAIMANT WILL BE NOTIFIED OF ANY DECISION AFFECTING THE PAYMENT OF BENEFITS OR GRANTING RELIEF. THIS NOTICE WILL INCLUDE THE REASON FOR THE DECISION AND THE NOTICE WILL ADVISE THE CLAIMANT OF HIS RIGHT TO INITIATE AN APPEAL.

3. VIOLATING THE CONSTITUTIONAL RIGHTS OF OUR CLAIMANTS, IS CONSIDERED A MATERIAL ERROR. THEREFORE, A SUBSTANTIVE ERROR WILL BE ASSIGNED WHEN PROCEDURAL AND APPELLATE (DUE PROCESS) RIGHTS ARE NOT PROVIDED. USE SUBSTANTIVE ERROR CODE 15g WHEN CALLING THIS ERROR. 210C/20

J W Hagan Jr.

RABRAMS:dmm 2/12/85 210C 211 210

SECURITY CLASSIFICATION

PAGE NO.
1

NO. OF PGS.
1

STANDARD FORM 14

EXHIBIT
219
Pltfs [illegible]

APR 5 1985

Legal Consultant

Documentation of Procedural Due Process

Director, Compensation & Pension Service (21)
Assistant Director, Field Operations (210A)
Chief, Quality Review Staff (210C)

1. In the past it was the policy of Quality Review, 210C to assign error code 15g, a substantive error, when it was discovered that procedural due process was not provided. Failure to provide procedural due process was defined as (1) the absence of any indication that a notification letter was furnished, (2) a materially inadequate notification letter and (3) situations where annotations indicated that a letter was deemed necessary but the file did not reveal any evidence except a self-serving annotation that the claimant was notified.

2. Recently I was directed to assign a procedural discrepancy code when I found a fact pattern similar to the 3rd situation described in the above paragraph. For the first time in my career with the Veterans Administration I must respectfully, but formally, protest a decision made by my supervisor.

3. When a document in the file is annotated that a notification letter was sent it does not prove that procedural due process was furnished. It only serves to show that the regional office thought that a notification letter should be sent. Therefore the annotation standing alone, is a self-serving statement that has very little if any evidentiary value. Without documentation the VA can only allege that procedural due process was provided.

4. The facts in the Semenchuk case, currently being litigated in Chicago, deal with the failure to document that procedural due process was provided. The court (according to Mr. Hickman, 211,) told the Veterans Administration that an annotation alleging that a notification letter was sent did not have evidentiary value. The fact situation in Semenchuk is the same as the described in #3 in the first paragraph of this memorandum. If this Service reduces the magnitude of the error assigned to fact patterns like that in the Semenchuk case, the Court could interpret this policy change as evidence that the Service is reluctant to enforce the obligation of its regional offices to provide and document that due process was furnished.

5. Our regional offices could interpret this policy change as a signal to reduce or completely stop their efforts to be make sure that notification letters were placed in the file. In addition station directors view substantive errors as a "red flag"; warning them that a local procedure is materially incorrect. Procedural discrepancies are not viewed with the same degree of concern as a substantive error.

6. The manual, paragraph 5.01e states that consideration should be given to the need for claims folder documentation when the adjudication officer gives someone else the authority to sign his or her name and release form letters. Chapter 17 of M23-1, part I, the manual for Administrative Operations, in paragraph 17.10, states that the early mail release program should not be used when the CTA does not have well trained personnel or a reasonable degree of stable employment. In addition consideration should be given to the capacity of the Files activity to maintain a reasonable state of currency with file mail.

7. There is nothing in the manual or the regulations that mandates that adjudication officers should use an early mail release program. In fact both chapter 5 of M21-1 and chapter 17 of M23-1 limit the use of this procedure. Therefore adjudication officers use the early mail release program at their option. The local quality review should identify situations where procedural due process cannot be documented. The assignment of a substantive error in Central Office for failure to document procedural due process should only confirm what was found in the regional office.

8. Unless the Veterans Administration can document that procedural and appellate (due process) rights were provided, the appeal period extends indefinitely. In addition, if a claimant alleges that he or she did not receive notification of a Veterans Administration decision, courts have held that an annotation does not document that such notice was provided. Therefore failure to document that procedural due process was provided should be considered a material error.

9. We currently assign a procedural discrepancy code when documents are filled out of chronological order or if we find that there were too many staples left in the file. It would not make sense to equate the failure to document that due process was provided with a basic folder maintenance problem.

10. At the present time the Director of our Service can go into Federal Court and explain that his service assigns the highest possible error code when fact patterns such as that found in the Semenchuk case are identified. He could argue that as an isolated incident, due to employee error. However if while this case is

being litigated, the C&P Service reduces the severity of the error call assigned in this situation, to the least significant error code, then Courts could hold this Service responsible if, in the future, patterns involving failure to document that procedural due process was provided were identified. In addition the Congress could question the sincerity of this Service when we insist that we make every effort to provide procedural due process.

11. I respectfully ask that we continue to assign a substantive error code when fact patterns, such as that found in the Semenchuk case are identified.

RONALD B. ABRAMS

[redacted]

5 AH

COMPENSATION AND PENSION REGIONAL OFFICE QUALITY AS MEASURED BY CENTRAL OFFICE QUALITY REVIEW

Introduction

The staff of quality review, 210C, summarized 1730 cases from approximately 11 regional offices in October and November 1984. A total of 834 errors (including "other" error) were called. These cases were reviewed and returned to the respective regional offices in prior months. However the summaries were not prepared until all the cases from an individual regional office were reviewed by the staff of 210C. Appendix D of M21-4, divides quality codes into three categories. These categories are: Substantive errors, Judgmental deficiencies, and Procedural discrepancies.

Definition of Quality Code Categories

1. SUBSTANTIVE ERRORS

a. Substantive error codes are for application when the effect of the action taken is to deny or grant a benefit authorized under existing law or regulations, when the correct action would have had the opposite result. The term "benefit"is not restricted to monetary considerations but also includes any other entitlement right subject to adjudicative disposition. The benefits denied or granted must be clearly erroneous without resort to judgment or opinion.

b. Quality codes for substantive errors are also applicable to errors which may not currently affect entitlement benefits, but if uncorrected could quite conceivably result in or be the causative factor for an improper allowance or denial of benefits in the future.

2. JUDGMENT DEFICIENCIES

a. When a different determination could be considered more tenable and appropriately justified on the facts of record and regulations applicable, a judgment deficiency should usually be considered to exist. When a judgment deficiency is cited on this basis disagreement [with it] should be based on the tenability of the questioned judgment as opposed to a contrary decision.

b. The use of the judgment deficiency codes will normally involve some degree of opinion. If the quality level of judgment determinations is questionable and allowed to continue, substantive errors may result. However, care should be exercised to avoid assignment of a judgment deficiency code solely on a difference of opinion in areas where reasonable persons would be expected to differ. The facts should be carefully analyzed and if significant judgment deficiencies cannot be identified, no exception should be taken.

c. Use of Judgment Deficiency Codes for Other Deficiencies. It is to be observed that some deficiency codes are assigned to the judgment deficiency category that are not strictly judgment in nature as this term is ordinarily applied. They are, however, included in this grouping because the deficiency usually results from inadequacy in the judgmental process or they are considered to be of greater significance than procedural or mechanical discrepancies. Subparagraph a above should control in borderline situations unless there can be a logical association with the codes in other code series.

3. PROCEDURAL DISCREPANCIES

Quality codes for procedural discrepancies are to be used to reflect noncompliance with procedural provisions when such noncompliance does not have actual or potential effect on entitlement rights.

However, if the noncompliance with mandatory requirements does have a material bearing on entitlement rights the appropriate substantive error code should be used.

Assignment of Error Codes

Substantive errors

Error code	Number of errors called
01 - Erroneous Denial of Service Connection	5]
02 - Erroneous Grant of Service Connection	0]
03 - Underevaluation	2]
04 - Overevaluation	8]
05 - Erroneous Dates (Underpayment)	6]*
06 - Erroneous Dates (Overpayment)	5]
07 - Failure To Take Rating Action	21]
08 - Failure To Schedule Future Reviews or Exams	2]
11 - Denial or Underpayment of Monetary Benefits	14]
12 - Overpayment of Monetary Benefits	27]
13 - Erroneous Dates (Underpayment)	8]**
14 - Erroneous Dates (Overpayment)	9]
15 - Failure To Take Authorization Action	25]
16 - Error With Controls	12]

Judgmental Deficiencies

Error codes	Number of errors called
21 - Questionable Judgment in Denying or Restricting Benefits	7]
22 - Questionable Judgment in Granting or Increasing Benefits	10]
23 - Failure To Take Rating Action	10]*
24 - Examination Deficiencies	4]
25 - Deficiency in Rating Board Action	13]
31 - Questionable Judgment in Denying or Underpaying Benefits	10]
32 - Questionable Judgment in Granting or Overpaying Benefits	5]
33 - Errors With Controls	116]**
34 - Deficiency in Authorization Action	108]
35 - Failure To Take Authorization Action	32]

Procedural errors

Error codes	Number of errors called
41 - Rating Action Procedurally Incorrect	28]*
42 - Rating Action Procedurally Incomplete	33]

51 - Authorization Decision Procedurally Incorrect or Incomplete 57]
52 - Other Authorization Actions Procedurally Inadequate 99]**
53 - Correspondence Action Incomplete or Incorrect 35]
54 - Error With Controls 113]

* Rating Error Code
** Authorization Error Code

Error Rate Overview

The substantive error rate was 8.4 percent. The judgmental error rate was 18.2 percent. The procedural error rate was 21.5 percent. The combined error rate for substantive and judgmental errors was 26.6 percent. It should be stressed that these percentages are based on all errors called. The error rate for statistical quality review purposes is based only on "countable" errors.

Countable and Other Errors Defined

A countable error is an error called on the issue that is for review. An "other" error is an non-countable error called on issues that are not for review. E.G., if an authorization action is for review, an error called on the rating board would be an "other" error. When an EP 120/1, is the issue for review, then countable errors would be those called on the handling of the initial claim, the establishment of the control, development, and product annotation, referral to the rating board and any other actions prior to the final resolution of the claim. If a 120/3 is the issue for review, then countable errors would be called on the final action taken such as an award, a rating, a disallowance or the notification to the claimant. Included as countable errors are actions which delay the processing of the claim at any stage.

Actions such as piecemeal development, unnecessary development, failure to put the case under control for an excessive length of time and failure to associate documents with the folder causing an unnecessary delay in the processing of the claim would be included.

Also failure to correct a prior substantive error would be considered as a countable error. (120/1 is the creation of end product 120; 120/2 is the cancellation of end product 120; 120/3 means that end product 120 was taken for credit as a one-time action.)

Rating Error Rates Compared To Authorization Error Rates

The substantive error rate for rating actions was 2.9 percent. The substantive error rate for authorization actions was 5.5 percent. The judgmental deficiency rate for rating actions was 2.5 percent. The judgmental deficiency rate for authorization actions was 15.7 percent. The combined substantive and judgmental error rate for rating actions was 5.5 percent. The combined substantive and judgmental error rate for authorization actions was 21.1 percent. The error rate for authorization error is almost three times as much as the error rate for ratings.

Error Rate Percentages For Significant Categories Of Errors

The error rate was a 2.5 percent for improper or questionable denials. There was a 6.1 percent error rate for failure to take rating or authorization action. There was a 13.9 percent error rate for failure to control claims or issues. There was 3.8 percent error rate for overpayments.

Authorization Error Calls Analyzed

Twenty-seven errors were called under substantive error code 12. Thirteen of these error calls were assigned to error code 12b. Error code 12b is usually assigned when a regional office fails to properly document a claim for dependency. Twenty-five errors were assigned under error code 15. Error code 15 involves failure to take authorization action. Twenty-two of the 25 error calls assigned to error code 15 were assigned to error codes 15f and 15g.

These error codes deal with failures by authorization to take action on a claim or failure to provide procedural and appellate (due process) rights. One hundred and sixteen error calls were assigned under error code 33. Error code 33 deals with control errors. Ninety-three of the 116 error calls were assigned under error codes 33e, 33f, and 33g. Error code 33e deals with premature recording of end products. Error code 33f deals with improper recording of multiple end products. Error code 33g deals with questionable judgment involving controls. One hundred and eight error calls were assigned under error code 34. Error code 34 deals with deficiencies in authorization actions. Seventy-four of the 108 error calls were assigned under error codes 34c, 34e, and 34g. Error code 34c deals with failure to provide complete information. Error code 34e deals with piecemeal development. Error code 34g involves unnecessary development.

Rating Error Calls

Fifty-one substantive rating errors were assigned. Twenty-one of these substantive errors were called under error code 07. Error code 07 deals with failure to take rating action. Over 40 percent of all substantive rating errors were called under error code 07. Thirty-one of the 95 rating substantive and judgmental errors called dealt with failure to take action by the rating board. Therefore, 32.6 percent of all errors called against the rating board were assigned because of failure to take action. It should be noted that the substantive rating and judgmental error rate was 5.3 percent. This compares favorably to the 5.5 percent substantive error rate for authorization actions. These figures reflect the professionalism and higher grade structure in the rating boards.

General Analysis

It is obvious that the bulk of our errors deal with failure to take action, improper devlopment or inadequate notification. Based on SQC experience and survey field trip experience, we conclude that there are several reasons for these errors. First, there needs to be a better national training program. Adjudicators need to understand the program so that they can develop claims properly and fully notify claimants. Second, we have to continue the increased emphasis on quality in our regional offices. Concomitant with this is the need to emphasize the prompt control of claims. It should be explained to adjudicators that failure to promptly control claims could cause a litany of mistakes including substantive errors.

Adjudication Management Responsibility

Adjudication management has the current responsibility to regularly review claims that have been in the system for specific periods of time. However if a claim is not put under control, management would not know if it is even in the system. If the claim was not controled Adjudication personnel with a backlog of many cases, could simply walk a folder back to the files without taking any action. Without controls our managers cannot expedite the processing of unnecessarily delayed or improperly developed claims and most importantly our managers would not be able to give our claimants the service they deserve. It should be evident to management that once all claims are promptly established and put on to the appropriate WIPP screen, management will have a very good idea of how much work there is to do. Therefore there should be a continued emphasis on the WIPP screen as a management tool. It should also be noted that if a claim is not promptly controlled other errors are the likely result.

For example, if there is an excessive delay in putting a claim under control, then there could be resultant pressure to promptly adjudicate the claim so that the timeliness of the station would not be adversely affected. This kind of pressure leads to unhappy results.

End products and awards are made with the claim only partially adjudicated. Development is taken after the "final action" on the claim. Awards are made based on insufficient supporting evidence because the claim is "old" on the target screens.Management could avoid most of these situations if all claims were promptly controlled. It should be noted that even the substantive errors called under error code 12b could be avoided if proper development was undertaken when applications involving claims involving dependents were properly controlled. Failure to control can also adversely affect rating board actions. For example if a claim is not promptly controlled or acted upon the rating board might be pressured to take some action finalizing the claim. We have noticed that these actions are usually taken concurrently with development. This is obviously improper. Therefore if a claim is properly put under control, management can, well before there is an excessive delay, call these folders up and have appropriate adjudication action taken.

Undue Emphasis On Taking Final Adjudicative Action

This analysis was based on 1,730 cases. According to Mr. Spindel, in Reports and Statistics,(711), the 1,730 cases reflect a relatively narrow statistical band. Quality review and survey field trip experience reveals that the errors called under error codes 07 (failure to take rating action), 12 (overpayment of monetary benefits), 25 (deficiency in rating board action), 33 (errors with controls), and 34 (deficiency in authorization action) are inter-related.

These errors are caused, in part, by unnecessary emphasis in the field on taking final adjudicative action. It should be stressed to our managers that a quality job and service to the veteran are just as important as showing improved timeliness and effectiveness figures.

Procedural and Appellate (Due Process) Rights

Even though program knowledge in the field could be improved, these figures do not reflect a serious problem with our entire program . The one specific area of the program identified by quality review statistics where some training is needed is in the area of procedural and appellate (due process) rights. It should be stressed in our training programs that in order for our claimants to understand their procedural and appellate rights, they need to know what decisions were made by the regional office.

Errors Distorting Regional Office Performance

Certain errors if uncorrected tend to artificially inflate regional office performance. For example a claim for pension is received. The veteran claims, as dependents, a wife and 2 children. Development for information that would satisfy the dependency requirements of the code of federal regulations should be undertaken shortly after receipt of this claim. However the regional office grants pension without adjudicating the issue of increased benefits because of dependents. Along with the award letter, the regional office then asks for the correct dependency information. The original end product is taken. When the certified marriage certificate and birth certificates are received another end product is taken. By incorrectly adjudicating claims in this manner, the regional office gets credit for two end products while showing a faster processing time than it really took to adjudicate the claim.

Another example is a situation where a claim for compensation benefits is denied concurrently with regional office development for service medical records. When the service medical records are received the claim is then properly adjudicated. In this case two end products would be taken. The regional office would only be entitled to the first end product. Again extra end product credit is received and a better processing time is shown. The majority of these errors are caused by an emphasis by adjudication management to quickly take end products so that better timeliness and effectiveness figures can be shown.

The Need For Accurate Information

Accurate information is essential for effective management. Therefore Central Office has stressed the prompt creation of a pending issue in the Target system when a claim is received. Unless our managers can tell how much and what kind of work is in their pipeline, they cannot properly plan, they cannot properly allocate personnel, and they could present a distorted statistical picture of their station.

Therefore, it is suggested that we, in the Compensation and Pension Service stress prompt control of claims as the first step of our training program. This will substantially reduce the number of errors called under error codes: 07 (failure to take rating action), 12 (overpayment of monetary benefits), 15 (failure to take authorization action), 33 (errors with controls), 34 (deficiency in authorization action), and 54 (discrepancies with controls). It should be noted that over 50 percent of all substantive errors were called under error codes 07, 12, and 15. Over 71 percent of all judgmental deficiencies were called under error codes 33 and 34. Of the 834 errors called, almost 50 percent were called under the error codes cited in the above paragraph.

Comparison Chart-Errors, Deficiencies, Discrepancies

	GOAL*	MAL**	Reported National Average	CO Findings
Substantive Rating	1.5	4	1.02	2.9
Substantive Authorization	1	3	1.48	5.5
Judgmental Rating	1.5	3.0	1.25	2.5
Judgmental Authorization	1.0	3.0	5.77	15.7
Procedural Rating	2.0	6.0	5.09	3.5
Procedural Authorization	3.5	3.5	5.94	17.5

The upper and lower control limits (control limits reflect the area of statistical validity), for MAL and GOAL are adjusted according to the sample size used.

The Central Office findings - are higher because Central Office does a thorough review and all errors were counted in this study. For example a substantive rating error found on a case called for quality review on an authorization issue would not be countable and would not be included for statistical Quality Review purposes.

Therefore this error would not be statistically reflected in the GOAL, MAL or National Average figures. However since the purpose of this paper is to measure overall quality and suggest training in specific areas, all errors were tabulated.

* GOAL - is the goal set by Central Office in the regional office to achieve.

** MAL - means minimum acceptable level.

Conclusion

It is estimated that a significant percentage (over 50 percent), of the errors found on Central Office Quality Review are caused by managers attempting to "overcome" the current management evaluation system. A close analyses of our program reveals that, in certain areas, we have become constitutionally vulnerable.

We have an ex parte system of adjudication. Therefore there is an increased burden to furnish award and disallowance letters that provide enough information so that our claimants can understand, the decision made and their procedural and appellate (due process) rights. However we have noticed not only a pattern of inadequate notification letters, but a pattern involving claims where there is no evidence that the claimant was notified at all.

There is also a pattern of claims being delayed, claims improperly developed, and claims prematurely denied. Part of the reason this is being done is to present a better statistical picture of the local adjudication division.

Just as we acted to protect the integrity of our system by insisting that claimants are entitled to a hearing at anytime during the adjudication process, we should so act to change our management evaluation system to reward those managers who provide better service to our claimants.

In order to do this we must insist upon a careful and thorough local quality review. The Compensation and Pension Service should implement a national training program for local quality review personnel. Our national quality review program should be revised so that the interests of our claimant's are paramount. Every adjudication manager should have a validation criteria in his or her performance standard.

If we in the Compensation and Pension Service implement these procedures, the ex parte nature of our system will be protected and we will not be vulnerable to a legal attack on the constitutionality of our adjudication process.

Department of Veterans Benefits
Washington D C 20420

Veterans Administration

NOV 5 1985

In Reply Refer To:
214B

Director (00/21)
Quality Review Committee
VARO

SUBJ: SQC TRAINING

1. This is the third in a series of training letters intended to improve local SQC procedures and the overall quality of adjudication actions. Secondary to comments received at the Adjudication Officer Conference, these training letters will be furnished quarterly, rather than semi-annually as indicated in the previous training letter. In addition, this letter, as well as subsequent training letters, will be expanded to include comments and suggestions from the Field Operations Staff (214A), based upon their identification of common problem areas noted during field station visits.

2. Numerous instances continue to be identified in which benefits have been authorized without acceptable proof of service (38 CFR 3.203), marriage (38 CFR 3.205), birth (38 CFR 3.209 and 3.210), and death (38 CFR 3.211). Photocopies of certified copies of original documents are not acceptable as primary evidence unless they meet the requirements of 38 CFR 3.204(b). The provisions of M21-1, paragraphs 7.04 and 32.16a, clarify these requirements. Error code 12a should be assigned in cases in which benefits were authorized without the acceptable proof indicated above.

3. Any request for a change in an apportionment requires development of income and expenses of all the parties involved and another apportionment decision before any adjustment in payments (M21-1, 26.14d, 26.03 and 26.05b). Failure to do so would warrant error code 15f.

4. When requesting evidence from a claimant, the claimant should generally be given 60 days to furnish the requested evidence before taking any action based upon failure to prosecute (M21-1, 7.01b). Many offices are inappropriately giving the claimant 15, 30, or 45 days before clearing the control, when such periods of time are not authorized by either the M21-1 or the regulations. The premature recording of the end product warrants assignment of error code 33e.

"America is #1—Thanks to our Veterans"

5. We have noted many inadequacies in the processing of claims following notice of VA hospitalization, such as requests for hospital summaries when the veteran was hospitalized for a non-service connected disability, and inadequate control for hospital reductions under 38 CFR 3.551 and 3.552. Training should be considered to refamiliarize those responsible for processing hospitalization notifications with the provisions of M21-1, Chapter 25, Subchapter I.

6. It appears that many rating boards are not fully considering the doctrine of reasonable doubt when adjudicating a claim for service connection or determining the degree of disability (38 CFR 3.102; Paragraph 3, Schedule for Rating Disabilities). If reasonable doubt arises as to service origin or degree of disability (Paragraph 7, Schedule for Rating Disabilities), such doubt must be resolved in favor of the claimant. When reviewing a rating decision on SQC, there should be no hesitancy to question the judgement of the rating board in denying or underevaluating a claim, if the evidence shows that a grant or a higher evaluation would have been more equitable. The Quality Review Staff (214B), in conjunction with the Advisory Review Staff (212A), will be applying the provisions of 38 CFR 3.105(b) to those cases identified on validation review which meet the above defined criteria.

7. As noted above, the remainder of this letter will be devoted to areas of concern identified on field station visits by the Field Operations Staff (214A).

8. Some stations are not fully complying with instructions for completion of the Monday morning DVB workload report (RCS 20-0207). This is true for the mail counts generally but particularly in regard to active and search mail over 5 days. Typically, these stations have not been including transfer-in mail, unrun active mail and mail in the DTU in all mail counts including those for over 5 day old mail. All active mail in Adjudication including that awaiting transfer-in of folders, or active mail in Administrative/Support Services awaiting identification, must be reported (DVB Cir 20-81-17).

9. Rating boards are not always establishing and maintaining future examination controls when such controls are clearly warranted. This is most notable in PTSD and other neuropsychiatric cases. Reexamination is to be requested if the disability is likely to improve materially in the future (38 CFR 3.327). Rating board members must consider PTSD as a treatable condition subject to improvement.

10. After reviewing a sample of POW ratings from several regional offices, I wish to make the following comments. Consistent with the doctrine of reasonable doubt, rating specialists must show the utmost sensitivity and compassion when evaluating these claims. Stringent interpretations of the POW protocol examination or of other medical evidence should be avoided. The veteran's contentions regarding his POW disabilities must be considered and a broad interpretation of the doctrine of reasonable doubt must be applied, without resort to speculation, (PG21-1, N-13). In order to ensure that the provisions of PL 97-37 are being uniformly followed, the Quality Review Staff (214B) will be requesting a select number of recent POW cases for review from each station. These will be requested concurrently with the cases selected for station validation, but will not be included in the validation process.

11. Another area of concern is exam requests involving former POW's. If a POW disability has previously been denied without a POW protocol exam, a POW protocol exam must be requested. When requesting the POW protocol examination, the VAF 21-2507 must be annotated to indicate the claims folder will be made available to the POW Physician Coordinator upon request, (M21-1, 55.03b). When reviewing and evaluating POW disabilities, a social survey is mandatory (M21-1, 22.06e).

12. During field visits, it has been noted that many file banks do not have a schedule for sequence checking. While it is desirable that sequence checking be done on a daily basis, annual leave and turnover often make it difficult to accomplish. However, station management should establish a schedule so that the entire regional office file banks are sequenced at least once a year, (M23-1, Part I, 13.11).

3.

Director (00/21)

13. Rating Boards should be reminded that the general policy requirements for ratings set forth in 38 CFR Part 4, Subpart A are always to be applied. Evidence is to be evaluated fairly and the Reasonable Doubt doctrine followed. It is the responsibility not only of the rating boards but also of those supervising and reviewing rating decisions to see that such decisions are well grounded in the facts, are fair in their application of rating principles and are made with understanding of the individual veteran's experiences while in military service.

GERALD P. MOORE, Director
Compensation & Pension Service

Veterans Administration

Memorandum

Date 9/25/86

From Ronald B. Abrams, Legal Consultant

Subj. Documentation of Due Process/NARS v. Walters/Analysis/Suggested Actions

To Director, Compensation and Pension Service (21)
THRU: Assistant Director) Adjudication Procedures
THRU: Chief, Project Staff

1. The constitutionality of the $10 limit on attorney's fees mandated by 38 USC 3404 is being challenged by the plaintiffs in the NARS case. The plaintiffs contend that the fee cap, on its face and as applied to them, violated their due process rights under the fifth amendment and their right to petition the government under the first amendment.

2. On June 12, 1984 the district court entered a nationwide preliminary injunction barring the VA from enforcing the fee limitation. The district court, Judge Patel, held there was a high likelihood that the plaintiffs would prevail on their procedural due process claim. The district court also held that in the absence of a compelling government interest for the fee cap, the plaintiffs appeared likely to prevail on their challenge to the statute under the first amendment. The district court determined there was a high likelihood that the statute, on its face was unconstitutional.

3. On June 28, 1985 the Supreme Court, Justice Rehnquist, overturned the preliminary injunction against the enforcement of the fee cap. Although the Court ruled on just the preliminary injunction, Justice Rehnquist's opinion involved itself in the merits of the case. The NARS case is now being tried in district court on the merits.

4. As a result of the requests for evidence and our recent depositions, plaintiff's attorney, Mr. Erspamer, has a good understanding of VA claims adjudication procedures. Because it is probable that you will be required to give another deposition, I feel it is my duty to prepare you for Mr. Erspamer's questions. I discussed this with you on September 3, 1986. At that time you gave me permission to prepare this memorandum.

5. Almost everyone connected or involved with this case feels that there is, in view of the previous district court decision, a high likelihood that the plaintiffs will again prevail in district court. I also believe that Judge Patel will rule in favor of the plaintiffs.

Documentation of Due Process/NARS v. Walters/Analysis/Suggestions

6. If we lose in district court, it is probable that the VA will appeal to the Supreme Court. In order to understand how to best counter Mr. Erspamer, we should first analyse the Supreme Cou decision.

7. Of the nine Supreme Court Justices, three found the statute unconstitutional on its face (Stevens, Marshall, Brennan). I predict that these justices will again find for the plaintiffs if the case reaches the Supreme Court. Also Justice O'Connor and Justice Blackmun concurred with Justice Rehnquist only in the decision to invalidate the preliminary injunction. They did not reach the merits. Therefore, it is possible that a majority of the Supreme Court could find for the plaintiffs, five to four.

8. The Supreme Court decision elicited several law review commentaries including a recent Harvard Law Review article. We must assume that Mr. Erspamer has carefully read the Supreme Court decision and the law review commentaries. Please note that the law review articles attack the legal underpinning of the Supreme Court decision.

9. Because Justice Rehnquist, in my opinion, prematurely involved t Court in the merits of this case, Mr. Erspamer also knows what factual evidence he has to present in order to win his case in the Supreme Court. Now that his case is being tried on the merits, Mr. Erspamer, courtesy of Justice Rehnquist and the law review articles, has a detailed blueprint on how to best present his case. Essentially Justice Rehnquist requires evidence of systemic unfairness in our procedures in order to find for the plaintiffs.

10. Justice Rehnquist dismissed the first amendment argument as having no independent significance. The commentators have attacked this position. Please note that the Supreme Court has previously held that, "The petition clause vests organizations and individuals with the right to employ counsel in pressing individual claims against the government". (See United Mine Workers Dist. 12 v. Illinois State Bar. Ass'n, 389 U.S. 217 (1967) and California Motor Transp. v. Trucking Unltd., 404 U.S. 503 (1972).

11. It is possible that the Supreme Court will reverse its decision regarding the first amendment argument. If it does I believe our statute will be overturned as unconstitutional. The Justice Department and our General Counsel have their hands full with this legal issue.

12. Alternatively, Mr. Erspamer will attack our due process procedures on two fronts. First, he will attempt to broadly define a "complex claim". The Supreme Court stated that the evidence presented did not adequately define the term, "complex claim". Second, he will characterize our claims adjudication process as unfair and unreasonable.

13. Mr. Erspamer will define a "complex claim", as a claim that requires any of the following: extensive development, difficult factual determinations, knowledgeable application of a vague rating schedule, identification of obscure claims, analysis of intricate issues and identification of inferred issues. I believe Mr. Erspamer will argue that thirty to fifty percent of compensation and pension claims are complex.

14. Mr. Erspamer will try to prove that our adjudication process systematically denies procedural due process. He will argue that our system is unfair and counteractive. He will contend that our management evaluation system emphasizes productivity and timeliness to such an extent that our managers are encouraged to violate the due process rights of our claimants.

15. Mr. Erspamer can show that it is in the best interest of our managers to have their people do, as quickly as they can, as many cases as possible. He can also show that adjudication duties dealing with the fairness of the adjudication process such as: control of claims, supervisory review of old claims, thorough development, recognition of all issues, providing adequate notice, documenting that notice was given, and careful quality review, tend to adversely affect gross productivity and timeliness statistics.

16. Because central office does not require its regional offices to validate their local quality review, Mr. Erspamer will contend that it is in the best interest of some of our managers to deny or ignore the due process rights of their claimants. He will argue that because due process procedures increase the time it takes to adjudicate a claim, thereby slowing production, it is not in the best financial interest of our managers to follow our regulations and directives dealing with due process.

17. Mr. Erspamer can show that a managers' bonus and merit pay evaluation is based in part on the adjudication division's productivity. He will state that our system encourages some adjudication managers to report incorrect quality levels because they know that their failure to do this part of their job will not be held against them. If Mr. Erspamer can show that our system pits the financial interest of adjudication officers against the fair and reasonable treatment of our claimants, he would be well on his way to proving the VA does have an unfair, adversarial claims adjudication system.

18. Mr. Erspamer has obtained reports identifying regional offices that prematurely denied claims without notice so that credit for completed work could be taken (Baltimore). He has survey trip reports and white papers documenting that certain stations: ignored claims (Phoenix), established and cancelled controls improperly (Baltimore, Hartford, San Francisco, WRO), discouraged complete development (Baltimore), ignored or didn't emphasize documentation of due process and carelessly performed local quality review (many regional offices).

19. The way to win this case is to distance the Compensation and Pension service, The Department of Veterans Benefits and the Veterans Administration from the people who, to improve their performance evaluations, abused our claims processing system and violated the rights of our claimants. I strongly suggest you, as Director of our Service, take appropriate administrative action against supervisors who, for whatever reason, encouraged or knowingly permitted the gross violation of the constitutional rights of claimants.

20. Your record as a manager is unblemished. You have approved every project, white paper, TWX, circular and M21-1 change we have prepared that improved our due process procedures. At this time I respectfully suggest you take the following actions to bolster the VA's position in the NARS case.

First, please approve the version of the enclosed TWX that includes paragraph four. For your information I enclose a copy of the memo written to you in April 1985, regarding documentation of due process. As you know this memo was destroyed before you had the opportunity to read it. Because paragraph four of this TWX deals with quality review, as well as documentation of due process, I ask you to direct section 214, to concur with this TWX.

Second; I suggest we propose to the Chief Benefits Director that he require a central office validation criteria for all adjudication managers regarding local quality review.

Third, I suggest we in 213B, call in several hundred cases to study whether or not Target generated letters are in the claims folder and whether notice was adequate.

Fourth, Because section 214 is changing M21-4 regarding the weight assigned to various error calls, I suggest you ask 214 to send the M21-4 change to 213B for concurrence. Enforcement of due process is not the sole concern of 214.

21. Whenever a case goes to the Supreme Court there is never a great deal of certainty. Judges, even Supreme Court Justices, have a tendency to reach a conclusion and then search for law to support their positions. If Mr. Erspamer can convince just two of six justicies that our adjudication process is unfair, I predict WE WILL LOSE!

22. We cannot defend the actions taken by some regional office and central office supervisors and win this case. Mr. Erspamer will present evidence tending to show the adjudication process is unreasonable and unfair. If we down play in Court; violations of VA rules by VA supervisors regarding the fairness of adjudication claims processing, the plaintiffs will prevail.

23. The due process clause assures *reasonable* procedural protections, applicable to the *fair* determination of the particular issues presented in a given case. (See Plato v. Roudebush 397F. Supp. 1295, (1975).) If the Court finds that our claims processing system is unfair, because VA managers are knowingly permitted to violate VA regulations and directives, I predict a majority of the Court will search for and find the "law" to overturn our statute.

24. The best approach would be to describe the improper actions as anomalies and aberrations. Explain that we in Central Office, under your direction, have been investigating these matters for a period of time. Although proving these improprieties was difficult and time consuming, we now have enough evidence to act. (See paragraph 18 supra.) Argue that our internal actions show the inherent systemic fairness of the VA adjudication process.

25. I do not think a majority of the Supreme Court wants to overturn the fee cap. However, if we back this court into a corner, do not assume that our current adjudication system will continue. The emotionalism generated by this case and the resultant publicity may affect the district court and even the Supreme Court. In addition, the facts presented by Mr. Erspamer may be used by those on the hill in favor of judicial review.

26. This memorandum is confidential. Because of its sensitive nature, I request that you not show this to anyone. I especially request that this memorandum not be seen by anyone in Section 214.

Ronald B. Abrams
RONALD B. ABRAMS

MAR 2 0 1987

Honorable G.V. (Sonny) Montgomery
Chairman, Committee on Veterans' Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On March 17, 1987, I appeared as a witness at a joint oversight hearing conducted by your Committee and the Senate Committee on Veterans' Affairs. During the course of questioning, Mr. Rufus Wilson asked that I furnish a statement of my background for the record. This communication satisfies that request.

I joined the Veterans Administration as a Veterans Claims Examiner, GS-7, in August 1973 at the Detroit Regional Office. I entered that position having finished my Bachelor's degree on the G.I. Bill and having served four years in the Army, including one year in Vietnam and two and one-half years in Thailand. I progressed through more responsible positions in the Adjudication Division until September of 1978 when, while serving on a disability rating board, I was selected for a position as a legal consultant in the Compensation and Pension (C&P) Service at VA Central Office.

Having served in the C&P Service for two and one-half years and having completed a Master's degree in management in my free time, I was selected for the position as the Assistant Adjudication Officer at the Washington, D.C. Regional Office in April 1981. I remained in that position for four years until I returned to the C&P Service as the Assistant Director for Field Operations in March 1985. This is my current position.

I trust the foregoing will satisfy the Committee's request. If more information is required, please have a member of your staff contact me at 233-2330.

Sincerely yours,

Michael A. Dunlap

Michael A. Dunlap

Honorable G.V. (Sonny) Montgomery
Chairman
Committee on Veterans' Affairs
United States House of
 Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for the opportunity to appear before a joint oversight hearing on March 17, 1987.

I understand the VA and others have also been invited. The VA will be represented by several fine witnesses. Individually and collectively they have more knowledge and a better understanding of the issues than I currently have.

For this reason and for personal ones, I respectfully decline.

Sincerely yours,

Gary Hickman
J. GARY HICKMAN

March 9, 1987

HAND DELIVERED

The Honorable G.V. Montgomery
Chairman
Committee on Veterans' Affairs
335 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Montgomery:

This letter formally will acknowledge receipt of your February 27, 1987 letter inviting me to appear as a witness in connection with the forthcoming hearings that your Committee is conducting with respect to the NARS v. Turnage lawsuit.

As you probably know, I previously testified under oath in a deposition concerning my knowledge of these matters, and frankly I do not believe I can add any additional information to that testimony. Accordingly, I respectfully decline the invitation.

Thank you very much for your consideration and understanding in this regard.

Sincerely,

Robert Yurgal

MAR 16 1987

Honorable G. V. (Sonny) Montgomery
Chairman, Committee on Veterans' Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

As I was on annual leave for the period from February 17 through March 13, I only today received your letter of February 27, 1987, inviting me to appear as a witness at the joint oversight hearing tomorrow, March 17.

In view of the the above, I am unable to prepare written testimony and also decline to appear to answer questions.

Sincerely yours,

Carol A. Wheeler

CAROL A. WHEELER, Chief
Policy Staff, Compensation
and Pension Service, Department
of Veterans Benefits

STATEMENT OF DONALD L. IVERS
GENERAL COUNSEL
VETERANS ADMINISTRATION
BEFORE THE
HOUSE AND SENATE COMMITTEES ON VETERANS' AFFAIRS
MARCH 17, 1987

Messrs. Chairmen and Members of the Committees, the Chief Benefits Director and I are pleased to appear today on behalf of the Veterans Administration in response to the request of Mr. Edwards. Because the litigation that prompted this hearing is still ongoing, we will not be able to discuss certain aspects of matters at issue in the case. However, we do wish to emphasize a few points that have not come through in some accounts of what has transpired in the case:

1. The court, after hearing three full days of testimony concerning the matter, did not find that VA personnel willfully destroyed or withheld documents in order to avoid their discovery, nor (we are convinced) could it have so found based upon the record before it.

2. Sworn testimony by all those directly involved in a June, 1986 "housecleaning" of some field operations files shows conclusively that it was done innocently and in the normal course of business; an earlier investigation by the Office of Inspector General concluded with the same finding.

3. The court has not yet ruled on the merits of the sole issue in this case, namely that the attorney-fee limitation is unconstitutional as it has been applied to radiation claims. This case is currently in an early pre-trial stage.

Background

To understand events that prompted the recent issuance of sanctions by the court, one must begin with a review of the NARS v. Turnage litigation itself. In June, 1985 the Supreme Court ruled that the attorney-fee limitation set forth in 38 U.S.C. §§ 3404 and 3405 is per se constitutional. Plaintiffs have contended in their amended complaint that the limitation is not constitutional "as applied" to a discrete class of VA benefit claimants--namely those claiming disability or death payments based upon exposure to ionizing radiation. Plaintiffs contend that radiation claims are so complex as to require the assistance of attorneys to successfully prosecute, and that such assistance is effectively foreclosed by the stringent fee restrictions in current law.

The issue having been so narrowed, it was reasonably anticipated that plaintiffs would prepare their case by attempting to identify any aspect of radiation-related claims or their adjudication that calls for skills or knowledge preculiar to attorneys. Plaintiffs' April 25, 1986 discovery request--their first request after they amended their complaint and their seventh set of requests for production of documents since the litigation was first filed in 1983--supported our belief that the issues of the case had been so narrowed.

After receiving an anonymous letter dated May 29, 1986, containing undocumented and unsupported allegations of various improper adjudication policies and practices, plaintiffs took a decidedly different tack. Their eighth request for document production (dated June 25, 1986) included broad requests for evidence of questionable handling of any claims, not simply of radiation claims, as reflected by regular field station audits or "quality reviews."

Plaintiffs' counsel then produced a second anonymous letter dated July 11, 1986, advising him that VA had received the eighth request for production. The letter recommended that further requests include "all error sheets and letters concerning due process and case (claims) control" and "station visit reports and staff analyses." (This letter contained further undocumented and unsupported allegations of a "conspiracy" by Field Operations Staff to deny the requested evidence, both by dishonoring requests that did not specifically name the desired forms or records and by an ordered purging of derogatory information contained in station files; these allegations were later refuted in sworn testimony detailing an innocent file cleaning that apparently was misperceived by someone who had no first-hand knowledge of what occurred.)

And so came plaintiffs' ninth request for production, dated July 18, which included requests for all documents pertaining to quality review of stations and involving a variety of subject areas without limitation to radiation claims, all station visit reports, periodic station analyses, station staff analyses, and performance standards for and evaluations of all adjudication officers system-wide. These broad requests, based upon anonymous, undocumented and unsupported allegations, were followed by the tenth, eleventh and twelfth requests for production, each of which continued to expand plaintiffs' quest for information further and further removed from the issue before the court, specifically: the constitutionality of the attorney-fee limitation as it applies to only radiation claims.

For example, the tenth request sought all AMIS statistical reports or data since 1983. These management inventory reports are computer printouts relating to all VA activities. They are extremely voluminous, such that those requested occupy approximately 950 cubic feet of space. However, the broadest request was probably the eleventh, which sought _inter alia_, _all_ "white papers, memoranda or other documents" prepared by any VA employee which relate to:

a. due process, including notice, ratings decisions, hearings and appeals;

b. adjudication of VA Claims;

c. VA rules, regulations and procedures;

d. any aspect of the administrative disallowance procedure;

e. ionizing radiation claims.

This describes virtually all of the work product of the Compensation and Pension Service, and a considerable portion of the work product of many other VA elements. While the Government has objected to the scope of this request, we have nonetheless presented for inspection by plaintiffs virtually every piece of paper stored in the Compensation and Pension Service, and much other material from other departments and staff offices.

Sanctions

The court ruled from the bench on January 8, 1987, on plaintiffs' motion for sanctions against the Government.

The transcript of the proceeding shows that the court determined VA had a broad duty to preserve even documents that may have been of potential relevance to the litigation. The court did not find that VA had demonstrated bad faith in either the document destruction or the failure to produce certain information and materials; it in fact held that a showing of bad faith was unnecessary for the imposition of sanctions, and imposed limited sanctions. Plaintiffs' request for punitive sanctions was denied.

Monetary sanctions were imposed for breach of this broad duty to preserve documents, in view of acknowledged discarding of documents by VA employees in the normal course of business. VA's duty was likened to that of a large corporation's obligation to preserve documents if faced with a large number of product liability suits. VA was also faulted for failure to notify all "responsible" personnel of the nature of the litigation and the need to preserve documents. In addition, the court cited VA's failure to organize a system to assure complete and accurate responses to discovery requests, and failure to timely disclose the existence of two automated data retrieval systems which can identify certain pending and decided radiation claims.

Having now been admonished by the court for failure to be fully and timely responsive, and having made payment for our transgressions both real and perceived, we are now in the process of preparing this case for trial. We are in the middle of extensive and broad discovery--an accepted element of the judicial process. We also recognize that the Federal Rules of Civil Procedure, as judicially interpreted, give any plaintiff wide latitude in pursuing discovery of evidence of even dubious relevance to a case. We would point out, however, that between the time of the 1985 Supreme Court decision and receipt of plaintiffs' eighth request for production of documents in July, 1986, VA was not on notice that plaintiffs were interested in proving anything other than the need for attorneys in presenting radiation claims. By all accounts, the records destroyed in the June 1986 housecleaning by Field Operations staff were not radiation-specific, a fact that should be considered in viewing the court's finding that we had a broad duty to preserve those materials.

Remedial Action

Having provided that background, I can assure you that a detailed plan is in place which will greatly minimize the chance of recurrence of any problems we have had in responding to plaintiffs' requests. Every single department and staff office in the Agency has now designated a discovery coordinator with responsibility for receiving all requests and for assuring that responses are thorough. We now require that each office or department head or his deputy certify that all relevant items have been provided, and I am personally co-signing the replies as they are sent to the Department of Justice. The new system is fully operational and working well, and the Administrator has committed the Agency to being fully responsive. For example, in response to the eleventh request, dated December 24, 1986, we have made available to plaintiffs almost 400 cartons of materials at roughly two thousand pages per carton. We are also producing some 700 complete claims folders after obtaining a court order protecting against the unauthorized disclosure of confidential information.

Additionally, the Department of Justice has directed more attention to this case--assuming primary litigation responsibility from the local U.S. Attorney's office, Justice has assigned several attorneys to the case and is actively involved in all aspects of the litigation.

Your letter inviting our testimony also indicated Mr. Edwards' interest in learning whether VA is providing due process in adjudicating disability claims. I have attached to my prepared remarks a white paper detailing some of the procedural protections built into our system. I must point out, however, that the issue of due process constitutes the heart of the allegation that is central to the litigation. I am certain you agree this is not the forum in which to litigate the merits of that issue. Therefore, I am also certain you will understand that it may become necessary to limit our responses to questions asked here today.

We are very mindful that some of the VA's detractors are attempting to sensationalize and exploit this situation. We have heard it alleged that the court's rulings on the narrow issue of discovery in this single case somehow reflect badly on our ability to perform our mission of service to veterans. Such inferences are so illogical and ill-advised that they merit no further discussion. I simply entreat all of you to keep in perspective what has occurred. There is no basis for scandal, and there certainly has been no conspiracy to deny veterans any benefit to which they are entitled. Dedicated people in this Agency work hard to provide benefits to veterans, and in some cases some of these same individuals did not take sufficient time from their main duties to fully respond to demands of plaintiffs in this case. The situation has been fully rectified, with all concerned VA employees now well aware of their responsibilities respecting the litigation.

Assuring "Due Process" in the Adjudication of Claims

Procedural due process is a concept grounded in beliefs that governmental actions should be fundamentally fair. The Veterans Administration has developed a system of procedures that assures claimants for benefits a fair opportunity to have their claims heard and decided, just some of which are described below.

For example, any communication or action indicating an intent to apply for one or more VA benefits is accepted as an informal claim, 1/ and prompts the forwarding of the appropriate claim form to the individual to complete. If upon receipt of the claim it is determined that additional supporting documentary evidence is required, e.g. a marriage certificate if claim is made as a married veteran, a letter is sent notifying the individual that the claim cannot be processed until the requested evidence is received. These notices inform that any eventual award, as provided by statute 2/, can be made effective as early as the date of claim if the requested information is forthcoming within a year's time.

Procedures in effect since November, 1986 provide that if after a reasonable time there has been no response, the claimant is notified that the claim is being denied for failure to prosecute. 3/ The notices again advise that the requested evidence can still be submitted within the year's time and will be retroactive to date of claim. Notice of the right to a hearing or to appeal the denial is also sent at this point.

A claimant has a right to a personal hearing before VA officials at any stage of the claims process and on any pertinent issue. 4/ VA will provide a hearing at either the VA Regional Office having jurisdiction over the claim, or at the Regional Office nearest the claimant's home. 5/ The hearings are non-adversarial and informal, as no technical rules of evidence are applied to frustrate the admission of pertinent information. 6/

If despite these opportunities to make ones case the claim is denied, notices inform the claimant of the right to initiate an appeal by filing a notice of disagreement within one year's time, of the right to a hearing either before the appeals board or at the Regional Office, and the right to representation. 7/ Receipt of a notice of disagreement prompts the preparation of a statement of the case notifying the claimant of the facts and laws forming the basis for the claim's denial. 8/ With it come instructions on how to perfect the appeal by completing a simple form for describing the arguments the claimant wishes to make on appeal. 9/ The claimant--now an appellant--is again advised of hearing rights at this stage, and of the right to representation. 10/ The decision by the Board of Veterans Appeals gives full notice of the findings of fact and legal conclusions supporting the Board's decision, 11/ and it too may be reconsidered upon allegations of error of fact or law. 12/

There is never a "final" denial of a claim for VA benefits in the sense that a previously denied claim can be reopened repeatedly and at any time upon submission of new and material evidence.

The VA also recognizes the need of beneficiaries for timely notice of impending reductions of benefits in order to contest the actions. Our notice and hearing instructions 13/ are currently being revised to insure that all recipients of compensation, pension and DIC payments are given a reasonable opportunity to challenge proposed reductions, suspensions or terminations of awards before the award actions are taken. Every effort is being made to strike a fair balance between claimants' interests in continued receipt and the need to prevent overpayments.

Finally, both the Department of Veterans Benefits and the Board of Veterans Appeals have quality-review programs in place that are designed to assure that VA instructions and regulations, including those extending procedural protections to claimants, are correctly applied.

FOOTNOTES

1. 38 C.F.R. § 3.155(a)
2. 38 U.S.C. § 3003
3. M21-1, Change 430, 11-25-86
4. 38 C.F.R. § 3.103(c)
5. Id.
6. Id.
7. 38 C.F.R. § 19.114
8. 38 C.F.R. § 19.120
9. 38 C.F.R. § 19.121
10. Id.
11. 38 C.F.R. § 19.180
12. 38 C.F.R. §§ 19.185 et. seq.
13. M21-1, Section 14.36

U.S. Department of Justice

Washington, D.C. 20530

January 7, 1987

MEMORANDUM

To: Clarisse Abramidis, Team Supervisor
Office of Litigation Support
Civil Division

From: Beth Gordon, Litigation Support Specialist
Office of Litigation Support
Civil Division

Subj: Proposed Budget for the NARS v. Turnage Litigation

The Office of Litigation Support has been asked to assist in the management of defendant discovery documents in the National Association of Radiation Survivors v. Turnage litigation. The suit was filed in 1983 against the Veterans Administration by a group of veterans from the National Association of Radiation Survivors. The veterans in this dispute are seeking to abolish an 1864 law that limits to $10 the amount in legal fees that veterans can pay in claiming Veterans Administration (VA) benefits. The plaintiffs' facial challenges to the constitutionality of the statute have been dismissed, so that only their "as applied" challenges remain. The 5,000 plaintiffs have already taken three years of discovery from the defendants. They have also sought discovery from veterans service organizations and numerous other government agencies.

The case was recently transferred from the U.S. Attorney's Office in San Francisco to the Federal Programs Branch of the Civil Division. A trial date has been scheduled for September, 1987.

Preliminary discussions with trial attorney Gena Cadieux, of the Federal Programs Branch, indicate that the volume of discovery material will be approximately 1,225,000 pages.

- 175,000 pages have been produced from the VA.
- Approximately 450,000 pages are currently being produced from veterans service organizations and other government agencies.
- 500,000 to 600,000 pages of documents, representing the claims files of 5,000 veterans, will be produced shortly.

In order to meet this request, OLS is recommending that the following services be provided.

1. Microfilming and blowback of all 1,225,000 pages of discovery documents

Microfilming of the documents prior to further handling and processing is necessary to ensure file integrity. When documents are microfilmed, unique frame numbers are assigned to each page of a document. This frame number allows for efficient tracking of all the pages in a given collection of documents.

Hard copies of each page of a document are produced from the microfilm for such purposes as trial preparation, document coding and analysis, and attorney review. The process of producing hard copy from microfilm is called blowback.

Microfilming and blowback of all discovery documents.	$228,480

2. Creation of a JURIS deposition file

This data base will be used for full text storage and retrieval of approximately 100 depositions that will be taken before the case comes to trial.

Gena Cadieux has indicated that 50 of the depositions have already been taken, and will have to be keyed to tape before they can be entered into JURIS. Arrangements are being made to have a court reporter provide the remaining 50 depositions on 9-track tape. This will minimize the cost to create these files.

The establishment of this data base includes coding of header sheets, data entry, tape processing, and user training.

Developing and implementing the JURIS deposition file.	$28,596

3. Creation and maintenance of a CLAIMS data base

Information from the 5,000 claimant's files will be entered into this data base. Examples of the types of information to be gathered on this system include:

- Claimant name, social security number, address
- Claim amount
- Claim/Case status
- Exposure information - location, amount, etc.

This data base will be updated regularly to reflect status changes. In addition, reports will be generated on a regular basis.

Creation of this data base includes data base design, data collection, data entry, data base establishment and ongoing updates, data base maintenance, and user training.

Designing, developing and implementing a CLAIMS data base	$150,814

4. Development of an INQUIRE document control data base

This data base will contain bibliographic, "document control" information from all defendant case documents. Document control information includes:

- Document number/locator
- Number of pages
- Document date
- Document type (memo, report, letter, etc.)
- Author name and organization
- Title

The process of establishing this data base includes data base design, document coding, data entry, tape loading, user training and system maintenance.

Two cost estimates have been developed for the creation of this data base. The first estimate includes costs for entering document control information into the data base for all documents, including those documents in the individual claims files. The claims files may, for example, contain letters, memos and reports, in addition to medical records and pleadings. The CLAIMS data base described in item 3., above, would not include bibliographic information for these documents, but only information gleaned from these documents.

The second cost total includes estimates for entering document control information from all defendant documents with the exception of the claims files. This approach would not provide us with any means of managing the documents in the claims files as documents.

I.	Designing, developing, and implementing an INQUIRE document control data base for all defendant documents including claims files.	$694,792
II.	Designing, developing, and implementing an INQUIRE document control data base for all defendant documents excepting claims files.	$364,267

5. Management services

In order to ensure that the project is completed on time and in the most efficient manner, it is recommended that a trial support coordinator and a paralegal be assigned on a full time basis for a period until trial.

The trial support coordinator will be responsible for directing the activities of all of the individuals involved in deposition and trial support for this case. In addition, this individual will assign support requests to the appropriate staff, perform quality assurance functions, ensure the timely receipt of specified deliverables, such as microfilm and case documents, and report the status of trial and deposition support activities to the project supervisor at the Office of Litigation Support.

The responsibilities of the paralegal will include performing legal research for the trial staff, summarizing deposition transcripts, performing on-line computer searches on the INQUIRE and JURIS data bases, compiling and indexing potential trial materials.

Management services	$132,720

By creating these three data bases and providing the other services presented above, the Office of Litigation Support will be able to provide the support that we feel is needed for this large document case.

GRAND TOTAL (including claims documents in INQUIRE document control data base)	$1,235,402
GRAND TOTAL (excluding claims documents from INQUIRE document control data base)	$904,877

Please let me know if you need any further information on this.

COPY

Date: Aug 22 1979

To: Chief Benefits Director (20)

From: Assistant General Counsel (023)

SUBJ: Proposed Disposition of Radiation Exposure Claims

1. The Chairman of the Interagency Task Force on Compensation for Radiation-Related Illness, a group formed at the request of the White House to propose recommended action to handle claims from civilians alleging exposure to radiation emitted during atomic weapons testing, has asked us to provide an estimate of the cost of compensating veterans with similar claims. For the purpose of your analysis, please assume the following: (1) the total veteran population exposed to atomic weapons testing is 250,000; (2) the incidence of radiogenic disease is not greater than the current projected estimate for that size population exposed to 5 rem of ionizing radiation. If a program were instituted whereby the VA would presumptively grant service connection to all exposed veterans suffering from a radiogenic disease, what would be the estimated cost of this compensation program? Given that it is impossible to distinguish naturally occurring disease from those that are radiogenically caused, it is assumed that your estimate would be based on an inclusion of all veterans suffering from disease thought to be associated with radiation exposure without regard to whether the disease was in fact radiogenic in origin.

2. In order that we may timely respond to the Task Force request, may we please have your response by the close of business on Friday, August 24, 1979. If you have any questions, please feel free to contact Fred Conway, x2782.

/s/
CHARLES M. JOHNSTON

COPY

AUG 24 1979

Assistant General Counsel (023)

Chief Benefits Director (20)

Radiation exposure claims - service connected compensation - estimated cost

1. This is in response to your memorandum of August 22 concerning the number of veterans suffering from cancer who would be granted service connection by reason of their participation in an atmospheric nuclear test, and, the estimated cost of compensation.

2. It is estimated that 25% of the 250,000, or 65,200 will acquire cancer. Of this figure of 65,200 veterans 40,000 have already acquired this disease. It is assumed that one-half, or 20,000, of these 40,000 cancer cases are living and 20,000 are deceased. Further, 5,000 additional veterans will come on the rolls in the first year and an additional 5,000 in the next four years.

3. The compensation, dependency and indemnity compensation and dependency educational assistance for dependents under Chapter 35 is set forth in the attached table.

/s/
DOROTHY L. STARBUCK

Att:

COPY

RADIATION CANCER CLAIMS

	1st Yr.	2nd Yr.	3rd Yr.	4th Yr.	5th Yr.
Vets Cases	23,000	26,000	29,000	32,000	35,000
Avg. Cost/Mo.	x1.092	x1.092	x1.092	x1.092	x1.092
Cost 1 yr.	$301,392,000	340,704,000	380,016,000	419,328,000	458,640,000
Surv. Cases	22,00	24,000	26,000	28,000	30,000
Avg. Cost/Mo	x 361	x 361	x 361	x 361	x361
Cost 1 Yr.	$95,304,000	103,968,000	112,632,000	121,296,000	129,960,000
Total 1 Yr. Comp. Costs ($000)	$396,696	444,672	492,648	540,624	588,600
Chapter 35					
Sons & daughters	11,400	11,000	10,500	10,100	9,700
Cost ($000)	$23,575	22,748	21,714	20,887	20,060
Wives & Widows	2,700	2,500	2,400	2,300	2,200
Cost ($000)	$4,846	4,488	4,308	4,128	3,949
Total Chapter 35 Cost ($000)	$28,421	27,236	26,022	25,015	24,009
Total Cost ($000)	$425,117	471,908	518,670	565,639	612,609

Office of General Counsel Washington D.C. 20420

Veterans Administration

In Reply Refer To: 02

MAR 5 - 1987

David C. Vladeck, Esq.
Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036

Dear Mr. Vladeck:

This will acknowledge receipt of your letter of February 10, 1987, and the information delivered to me by Mr. Abrams. I apologize for the delay in getting back to you.

Initially, I would like to say that I appreciate your cooperation in providing this information to me. I have reviewed the materials personally and have discussed the situation with John Vogel, the Chief Benefits Director. He is currently studying the matter and I expect to talk with him again soon about it.

I think it is necessary to state at this point that it is clear that Mr. Abrams has a right to, and a reasonable expectation of, fair and equitable treatment and consideration. It is our intention to do everything possible to see that this is achieved. However, I do not believe that it is reasonable for either you or Mr. Abrams to expect that his professional position will be enhanced in the course of this process.

We feel that it would be in the best interest of both the Veterans Administration and Mr. Abrams to do whatever is necessary, within reasonable parameters, to improve the working environment for Mr. Abrams. I assure you that we are examining the available options with that goal in mind.

In connection with your statement of intent to seek access to Mr. Abram's personnel files, please be advised that if Mr. Abrams will provide us with prior written consent, we would be more than happy to provide copies of the records to you.

2.

David C. Vladeck, Esq.

One final item, in reference to your observation that the Veterans Administration has chosen "not to ferret out and punish the wrong-doers," I might point out that the allegations of harassment have been referred to the Criminal Division at the Department of Justice and that they are now in the position of looking into the matter. While the Department of Justice would have no formal objection to our initiating an internal investigation, they have advised that such internal investigation can often result in unnecessary duplication and possible damage to the integrity of the criminal investigation. Therefore, a conscious decision has been made by the Administrator of this Agency to forego any internal investigation of any of the allegations that might be pursued in the course of the criminal investigation and to concentrate instead on providing full cooperation to the criminal investigation, devoting the attention and resources necessary to full participation and cooperation in the NARS litigation discovery process and to monitoring our internal processes and procedures in an effort to determine whether or not modification of its processes and procedures may be necessary. At an appropriate point in time, after the Criminal Division has made its determination and when we are comfortable with our progress in preparation for litigation in the NARS case, we will then examine other issues raised in the course of this matter and determine what action must be taken by the Veterans Administration.

I hope to be able to get back to you with some further information with respect to Mr. Abram's employment situation in the near future.

Very truly yours,

DONALD L. IVERS
General Counsel

cc: Chief Benefits Director (20)

Veterans Administration

Memorandum

Date MAR 17 1987

From General Counsel (023)

Subj Appearance Before Joint Veterans Affairs Committee

To Legal Consultant (0213A)

1. You have asked a number of questions about your invitation to appear before the HVAC in your individual capacity to provide testimony regarding the case NARS v. Turnage. You ask that we advise you on your rights and duties as witness invited by the Chairman to appear as an individual rather than as a VA official.

2. As the law office for the VA, we cannot provide legal advice to individual employees regarding their personal activities. For specific advice regarding your individual rights you may wish to consult your own lawyer. You should also feel free to consult HVAC counsel or staff members regarding the invitation to testify and your potential testimony. The decision whether or not to accept the invitation to testify is entirely up to you. Neither the Agency nor the Office of General Counsel has the authority to approve or to disapprove your appearance before the Committee in your individual capacity.

3. Your rights as an employee will not be affected by your testimony as an individual so long as your testimony is truthful and responsible. Any disciplinary action against you for truthful and responsible testimony would, of course, be inappropriate.

4. You may want to discuss the issue of your testimony being sealed by the court with counsel to the HVAC. The Government has filed with the court a motion for the court to release witness from its order instructing witnesses not to discuss their testimony until further instruction from the court. To date, the court has not ruled on the motion.

Donald L Ivers

DONALD L. IVERS

REPORT NUMBER: 2AB-B01-103
PROJECT NUMBER: 1-AB-003

REPORT OF AUDIT

DEPARTMENT OF VETERANS BENEFITS
STATISTICAL QUALITY CONTROL
FOR BENEFITS AUTHORIZATIONS

JUL 15 1982

Office of Inspector General
Office of Audit
Veterans Benefits Division
Washington, D.C.

DEPARTMENT OF VETERANS BENEFITS
STATISTICAL QUALITY CONTROL
FOR BENEFITS AUTHORIZATIONS

SUMMARY

The Office of Inspector General, with the cooperation and assistance of the Department of Veterans Benefits (DVB), audited the Department's Statistical Quality Control (SQC) review process. SQC is the primary quality measurement and evaluation mechanism DVB uses to evaluate compensation, pension, and education payments to beneficiaries. The audit evaluated the effectiveness of the SQC review process in determining the accuracy of benefits payments. In Fiscal Year 1981, the VA paid about $14.6 billion in compensation, pension, and education benefits to 5.8 million beneficiaries.

The SQC system is not effective in measuring the actual levels of quality in benefits authorizations. Our review of a nationwide sample of 4,428 authorizations disclosed substantive (payment or entitlement) error rates of 8.6 percent for education and 5.4 percent for compensation and pension actions. These error rates do not meet established quality standards and are 2 and 3 times the rates reported by regional offices (pages 4-6).

We project that actual uncorrected erroneous payments to beneficiaries totaled approximately $79 million in Fiscal Year 1981. The erroneous payments include $48 million in overpayments and $31 million in underpayments for a net loss of $17 million to the Agency in Fiscal Year 1981 (pages 6-7).

In addition, judgement errors, where the evidence of record did not sustain the authorized level of payments, accounted for unsupported payments of approximately $183 million. This includes possible overpayments of $171 million and $12 million in possible underpayments (page 7).

The results of regional office SQC reviews were not accurate because reviews are cursory, are not independent, and reviewers lack the technical expertise to find errors. Central Office validations were not effective in identifying the extent of problems in SQC reporting (pages 7-9).

There are a number of limitations that further reduce the effectiveness of the SQC system in identifying specific quality problems: current quality standards do not reflect the cost of erroneous payments, effects of technological changes in processing, or other changes in programs since the standards were established; there is no systematic evaluation of national error trends; and, the scope of SQC reviews is too limited (pages 10-13).

Inadequate quality measurement practices hinder the quality control process, preventing the identification of significant error trends and their causes, and preventing the initiation and evaluation of quality improvement measures.

We recommend that DVB revise the SQC system by: assigning the function to independent, technically competent staff at regional offices and changing Central Office validation procedures to accurately reflect achieved quality levels; performing periodic evaluations of national error trends and quality standards; and, redesigning the statistical basis of the system to reduce sample sizes.

The audit results showed a number of significant problem areas in authorizations processing such as income computations, dependency issues, effective dates, training time determinations, and improperly assigned end product codes. We recommend that DVB take action to determine the causes of these problem areas and implement corrective actions (pages 18-19).

The primary purpose of quality control is to prevent errors and their resulting costs by improving performance. In order to provide reliable information on which to plan, implement, and evaluate quality improvement actions, SQC reviews must accurately identify errors. In addition, accurate error identification will result in collection of overpayments or reimbursement for underpayments. Implementation of the recommendations contained in this report should contribute significantly to the prevention of future improper payments.

Management Response and Audit Comments

The Chief Benefits Director did not express substantive disagreement with the reported extent of erroneous adjudication actions determined by our review. However, the Department did not agree with audit recommendations which might lead to improved quality control and reductions in the number of errors. Appendix II contains the entire text of the Department's response along with our comments.

While program management has taken no substantive exception with the reported extent of erroneous adjudication actions, they do not agree with audit suggested recommendations to correct the condition, nor do they present alternative solutions. Without positive and timely action to change the present system, the current level of erroneous adjudication actions will continue and senior VA management will not have a reliable monitoring and reporting system on which to base corrective actions.

For Official Use Only.
Public Availability To Be
Determined Under 5 U.S.C. 552

TABLE OF CONTENTS

Page

Part I - INTRODUCTION 1

- A. Background 1
- B. Scope 1

Part II - RESULTS OF AUDIT 3

- A. Findings and Recommendations 3
  - 1. SQC Review Process at Regional Offices and Central Office 3
  - 2. Current SQC System Limitations 10
  - 3. Current SQC Statistical Model 14
  - 4. Quality of Adjudication Authorizations 18
- B. Exhibits
  - 1 - Education Error Rate Ranges at 95 Percent Confidence 20
  - 2 - Compensation and Pension Error Rate Ranges at 95 Percent Confidence 21
  - 3 - Projected Annual Payment Error Ranges.. 22
  - 4 - Distribution of Education Substantive Errors in Sample.. 23
  - 5 - Distribution of Education Judgement Errors in Sample.. 24
  - 6 - Distribution of Education Procedural Errors in Sample.. 25
  - 7 - Distribution of Compensation and Pension Substantive Errors in Sample.. 26
  - 8 - Distribution of Compensation and Pension Judgement Errors in Sample.. 27
  - 9 - Distribution of Compensation and Pension Procedural Errors in Sample.. 28
- C. Appendices
  - I - Audit and Analysis Methodology and Definitions 29
  - II - Department of Veterans Benefits Response and Audit Comments.. 32

PART I
INTRODUCTION

A. Background

Statistical Quality Control (SQC) is the primary quality measurement and evaluation mechanism the Department of Veterans Benefits (DVB) uses to evaluate payments to beneficiaries. The 58 VA regional offices responsible for authorizing benefits payments processed 8.7 million authorization actions and paid approximately $14.6 billion in benefits in Fiscal Year 1981. Regional offices reviewed 109,846 benefits authorizations for SQC during Fiscal Year 1981. Based on estimates DVB furnished to us regarding the time spent at regional offices and Central Office, we determined that the SQC process cost about $850,000 to operate in Fiscal Year 1981.

Requirements, responsibilities, standards, and procedures for the SQC process are explained in DVB Manuals M20-2, "Quality Control", and M21-4, "Quality Control and Qualitative Measurement in Adjudication Divisions."

B. Scope

We audited DVB's SQC review process. The purpose of our audit was to evaluate the effectiveness of the SQC review process as DVB's primary quality control mechanism over payment authorizations. The objectives of our review were: (i) to independently determine the national error rate for authorization actions affecting benefit payments and project the amount of erroneous payments resulting from incorrect authorizations; (ii) to evaluate the accuracy of SQC reviews by comparing the independently determined error rate to DVB's reported error rate; (iii) to evaluate the statistical and procedural basis of the SQC process; and, (iv) to identify significant types of errors affecting adjudication authorization quality levels.

Our audit was made in accordance with the Standards for Audit of Governmental Organizations, Programs, Activities and Functions. We examined 4,428 randomly selected award actions processed from June 1, 1980 to May 31, 1981. Our sample was nationwide and included 3,927 compensation and pension award actions and 501 education award actions. Approximately half of each type of award action had been previously reviewed as part of the regional offices' SQC process. The other half of the sample was an independent sample of award actions processed during the same period but not included in SQC reviews. We coordinated the development of our sampling methodology with DVB officials and incorporated their suggestions for selecting a representative sample of adjudication authorizations.

The audit team reviewed cases in accordance with DVB quality review procedures. Cases were reviewed for substantive, judgement, and procedural errors. In addition, we expanded the review scope to determine the amounts of overpayments or underpayments where applicable, and to determine the impact of prior errors on current actions subject to SQC review. In every instance where the audit team identified an error, the case was sent to Central Office for verification by DVB staff. The verification process resulted in some changes in error classifications and in some additions and deletions of errors. All issues were resolved and the mutually agreed upon results were used for our analysis. A detailed explanation of our audit sampling and analysis methodology is in Appendix I.

Our audit did not evaluate the effectiveness of DVB actions to improve the quality of work processed except for their use of SQC review findings in appraising actual quality levels in relation to quality standards. The audit did not evaluate award processing quality or the quality of SQC reviews at any particular regional office. Our discussions regarding the quality basis of SQC reviews are based on findings from recent Inspector General audits of regional offices and from discussions with DVB officials. Our projections of erroneous payments were limited to cases having adjudication action during the review period. We did not attempt to project payment errors for beneficiaries receiving payments but not having adjudication action during the review period, or for the entire VA beneficiary population.

PART II
RESULTS OF AUDIT

A. Findings and Recommendations

1. SQC Review Processes at Regional Offices and Central Office

Finding

The SQC system is not effective in measuring the actual quality levels of benefits authorizations. Actual error rates are significantly higher than reported and do not meet standards. Reported quality levels have been overstated and department management has not been made aware of the extent of actual quality problems. Regional office SQC reviews are not identifying all processing errors, and therefore actual error rates are understated. Regional office SQC review results are inaccurate because reviews are cursory, are not independent, and reviewers may lack the technical expertise to identify errors. Because of ineffective review procedures, Central Office independent validations have not adequately determined the extent of the problems in regional office benefits authorizations and quality reviews. The audit projects that actual uncorrected payment errors of $79.3 million and unsupported payments of $183.5 million were made to beneficiaries in Fiscal Year 1981. Ineffective SQC reviews distort reported quality levels, do not identify many problems in benefits authorization processing, and prevent the initiation of actions to improve quality.

Recommendations

We recommend that DVB take necessary steps to improve the accuracy and effectiveness of SQC reviews at Central Office and regional offices by:

a. Reassigning the SQC review function from first line supervisors to independent, technically competent staff at regional offices.

b. Revising the procedures used in Central Office independent validations to emphasize the evaluation of the accuracy and reliability of regional office SQC reviews. The validation sample should be selected from authorizations included in regional office SQC reviews rather than being an independent sample.

Management Response

Program management does not take exception with the cited conditions. They do not concur with the recommendations for corrective action (see Appendix II).

Discussion

a. Background. The SQC review process is the formal quality measurement and evaluation mechanism for the authorization of benefit payments to veterans and other beneficiaries. It is the first step in the quality control process. The purpose of SQC is to systematically detect quality variations by determining the quality level of finished and in-process work, and to compare the measured quality with standards. SQC results should be used to determine the optimum quality levels obtainable under given conditions with available resources, to assist in improving quality and productivity, and to reduce costs.

The SQC review process consists of two main components, reviews done at the regional offices and Central Office independent validations. At regional offices, Adjudication Division firstline supervisors perform or supervise formal SQC reviews of the authorizations produced under their supervision. These reviews should provide the basic data to determine actual quality levels and to help identify the types and causes of errors.

DVB Central Office program services perform periodic independent validations of reported regional office quality levels. The purposes of independent quality reviews are to verify that quality standards are being met and to determine if the quality levels reported by regional offices are accurate. The independent validation of regional office SQC findings is the primary source of data for DVB Central Office appraisal of regional office performance in processing claims. According to DVB quality evaluation guidelines, regional office SQC results are accepted for determining the current quality of adjudication claims processing if validated by independent validation review results. Compensation and Pension Service does validation reviews of individual regional offices on a six month cycle and Education Service does validation reviews on an eighteen month cycle.

b. Regional Office SQC Results Overstated Quality Levels. The audit review of a national random sample of 4,428 authorization actions found error rates in all three general error categories that were significantly higher than shown in regional office SQC reports for the same twelve month period. We analyzed our audit findings to determine the true population error rate range at 95 percent confidence. Our findings based on a review of 501 education authorizations and 3,927 compensation and pension authorizations are shown below. Detailed comparisons of audit error rates and reported error rates are shown in Exhibits 1 and 2.

Education

- The population substantive error rate is 8.6 percent ± 2.5 percent, or from 6.1 to 11.1 percent.
- The population judgment error rate is 8.0 percent ± 2.4 percent, or from 5.6 to 10.4 percent.
- The population procedural error rate is 13.2 percent ± 3.0 percent, or from 10.2 to 16.2 percent.

Compensation and Pension 1/

- The population substantive error rate is 5.4 percent ± .7 percent, or from 4.7 percent to 6.1 percent.
- The population judgement error rate is 4.3 percent ± .6 percent, or from 3.7 percent to 4.9 percent.
- The population procedural error rate is 9.7 percent ± .9 percent, or from 8.8 percent to 10.6 percent.

Comparing the minimum actual error rates to the error rates reported by regional offices shows that the minimum actual error rates are from 2 to 3 times higher than reported.

Summary of Reported Regional Office Error Rates

	Education	Compensation and Pension
Substantive Errors	2.7 percent	1.5 percent
Judgement Errors	1.7 percent 2/	1.9 percent
Procedural Errors	4.6 percent	4.2 percent

A one percent substantive error is equivalent to a point estimate (arithmetic mean) annual uncorrected payment error rate of $2.7 million for education benefits and $6.4 million for compensation and pension benefits. The difference between the implied amount of payment errors at the DVB reported error rates and at the audit error rates is $15.9 million more for education benefits and $25.1 million more for compensation and pension benefits.

c. Error Rates Exceed Standards. Audit results showed that quality standards were not met in any error category for education or compensation and pension authorizations. The standard for substantive and judgement errors is 3 percent and the standard for procedural errors is 3.5 percent. We compared error rates found in the audit sample with the upper control limit for each error category's standard. Upper control limits were computed according to the method used by DVB, which uses a three standard deviation (99.7 percent) confidence level. According to DVB national SQC reports, only procedural errors exceeded the allowable upper control limit for the quality standards. However, error rates found in the audit review exceeded the allowable upper limits in all error categories in education and compensation and pension authorizations.

1/ Because education dependency actions were included in regional office compensation and pension samples, some also appeared in the audit sample. The effect of education actions in compensation and pension sample results is explained in Appendix I.

2/ This error rate excludes data for the Manila Regional Office. Their reported 12 month cumulative judgment error rate of 41.7 percent appears to be erroneous.

Education	Audit Error Rate	Upper Control Limit for Applicable Standard
Substantive Errors	8.6 percent	5.3 percent
Judgement Errors	8.0 percent	5.3 percent
Procedural Errors	13.2 percent	6.0 percent
Compensation and Pension		
Substantive Errors	5.4 percent	3.8 percent
Judgement Errors	4.3 percent	3.8 percent
Procedural Errors	9.7 percent	4.4 percent

d. Amount of Erroneous Payments Is Significant. We estimated that actual uncorrected payment errors totaled $79.3 million in Fiscal Year 1981. Of this actual error, approximately $48.4 million was overpaid and approximately $30.9 million was underpaid. From these estimates, Agency net losses due to erroneous payments were about $17.5 million in Fiscal Year 1981.

We collected data on payment errors from our review of 4,428 compensation and pension and education authorizations. We gathered this information because DVB does not compute the amounts of erroneous payments due to errors identified in the SQC process, and because of the increased monetary value of veterans' benefits. We defined actual payment errors as either overpayments or underpayments caused by substantive errors in the authorizations under review which had not been corrected by a subsequent action. Payment error amounts were calculated as the difference between entitlement and actual payment from the effective date of the authorization to the date of last payment or the date of our review, as appropriate. We used point estimates of amounts of erroneous payments to simplify the discussion in this section of the report. The entire probable ranges of erroneous payments are shown in Exhibit 3. Our methodology for estimating the amount of erroneous payments is explained in Appendix I.

We found a 2.7 percent ± .5 percent payment error rate at 95 percent confidence accounting for $47,372 in actual uncorrected errors in the compensation and pension sample of 3,927 authorizations. This means at least 2.2 percent of compensation and pension actions worked in Fiscal Year 1981 caused a payment error. This is equal to at least 63,000 end products, the equivalent of having every compensation and pension end product produced by the Indianapolis VA Regional Office result in a payment error for Fiscal Year 1981. Our point estimate of actual uncorrected compensation and pension payment error was $34.7 million, including $19.2 million in overpayments and $15.6 million in underpayments.

We found a 3.2 percent ± 1.5 percent payment error rate accounting for $4,379 in erroneous payments in the education sample of 501 authorizations. For Fiscal Year 1981 we estimated that uncorrected erroneous education payments total $23.2 million, including $15.9 million in overpayments and $7.3 million in underpayments.

The audit review identified additional payment errors caused by erroneous authorizations processed before the actions under review but which resulted in an erroneous payment in the current action. For education authorizations, we found an additional 1.8 percent payment error rate amounting to $3,686. For compensation and pension authorizations we found an additional .1 percent payment error rate amounting to $2,290. This increases the projected erroneous payments for Fiscal Year 1981 by $19.5 million for education benefits and by $1.8 million for compensation and pension benefits. The effects of these additional errors in DVB's quality measurement system are discussed further on pages 12-13.

We also identified unsupported payments of $106,929 in 69 of the 4,428 cases reviewed that resulted from judgement errors where the evidence of record did not sustain the authorized level of payments. As a result, we estimated the VA is paying compensation, pension, and education benefits of about $183.5 million a year, including $171 million in overpayments and $12.5 million in underpayments, without proper verification that beneficiaries are entitled to these payments.

e. Causes of Inaccurate Regional Office SQC Reviews. Since we did not visit regional offices as a part of this audit, our discussion of the reasons why regional office SQC reviews do not show correct quality levels is based on causes identified in discussions with DVB officials and findings of recent audits of regional offices. We believe that SQC reviews are inaccurate because reviewers may not have technical knowledge to identify all errors, the reviewers lack independence, and reviews are cursory.

Many SQC reviewers may lack the current technical knowledge needed to identify all types of errors. Reviewers are generally unit chiefs or higher level Adjudication Division supervisors who do not routinely process authorizations and may not be able to recognize all types of errors. Because regional office reviews are not independent, the reviewers' objectivity may be affected. Supervisors often perform SQC reviews of the work produced in their own units which may result in less than complete objectivity in selecting samples and in reporting errors. SQC reviews may be cursory or superficial because reviewers do not spend enough time to do thorough reviews. This is due to an emphasis on production over quality and time spent on other supervisory duties.

f. Central Office Validations Are Not Effective in Identifying Problems. DVB Central Office independent validations have not identified or adequately addressed regional office authorization processing problems or the quality of regional office SQC reviews. The reviews are ineffective because independent samples used are not representative of the regional office SQC samples being validated, and the analysis of independent review results is not effective in identifying the scope of quality problems. As a result, validations do not provide accurate or complete information on the types of quality problems in authorizations processing and in regional office quality reviews. This prevents the identification of the causes of errors and the initiation of steps to improve quality at both the national and regional office levels. Our review of a sample of 86 recent validations (28 by Education Service and 58 by Compensation and Pension Service) identified a number of factors which limit the effectiveness of independent quality validations.

Independent validation samples are not representative of the regional office SQC samples being evaluated. The independent sample listings are selected from a 1 to 2 month time period while regional office SQC reports under review are 12 month cumulative results. Because the independent sample is selected from a significantly shorter time frame, it is not representative of the entire population of authorization actions processed in the 12 month period covered in the regional office SQC reviews. As a result, independent validations may reflect short term quality that is not representative of the entire quality period covered by regional office SQC reports. Compensation and Pension Service validations have found lower error rates than shown by the audit review because the validation sample is not fully representative of the population being reviewed. The validation sample is selected from a random listing of actions generated by the automated benefits processing system. However, Compensation and Pension Service routinely excluded end product 130 (dependency actions), and non-randomly selected the other actions that were reviewed. This resulted in the sample actions reviewed containing less of the types of actions most susceptible to errors. The substantive error rate was 2.4 percent for 4,575 actions reviewed in compensation and pension validations done between April 1980 and April 1981. By adjusting for the correct sample proportions and including end product 130, we calculated the validation error rate at 4.8 percent ± .7 percent at 95 percent confidence, which exceeds the control limits for the 3 percent error standards. This adjusted error rate is not significantly different from the audit error rate of 5.4 percent ± .7 percent.

The independent validations do not provide specific data on the accuracy of regional office SQC reports. Because independent validation samples consist of actions that were not included in regional office SQC reviews, validators cannot identify many specific instances of errors not identified or reported by regional office reviewers. As a result, validations cannot analyze the type, magnitude, or causes of inaccuracies in regional office SQC reviews. Reviewing an independent sample can only provide a general indication of whether or not actual quality is as good as reported by regional offices. However, our review of 86 validations showed that DVB did not always identify or develop those situations where inaccurate regional office SQC reports were indicated. The results of 86 validation reviews showed indications of inaccurate regional offices SQC reviews in 30 instances. In 22 validations, the problem was not addressed at all. In the remaining 8 validations where questionable SQC accuracy was identified, the reviewers specifically noted the need to improve the quality of the regional office SQC review in only 3 instances.

Even though independent validations place more emphasis on evaluating the quality of authorization actions reviewed than on the quality of regional office SQC reviews, the depth of the analysis of authorization quality is limited. When out of line situations are identified, validators generally recommend that the types of errors found be included in regional office training sessions, even though the conclusion that quality is not meeting standards may be based on identifying as few as two errors in very small samples which may not be representative of the real regional office quality levels or specific quality problems.

g. Ineffective Regional Office and Central Office Quality Reviews Prevent Quality Improvement. Ineffective regional office SQC reviews and independent validations hinder the entire quality control process. Ineffective reviews have hidden the fact that quality levels are not as good as reported and are not meeting standards. As a result, local and Central Office managers may not be aware of significant quality problems. This prevents the identification of the causes of problems and the initiation and evaluation of corrective measures to improve quality.

2. Current SQC System Limitations

Finding

Current deficiencies in the SQC system limit its effectiveness and have contributed to the continuing unreliability of the SQC system. The SQC system does not provide an ongoing assessment of established quality standards, analyze existing data to improve SQC operations nationally, or provide the most accurate measurement of current quality. This is because DVB officials believed action was not necessary based on the reported error rates which showed the system to be operating at an acceptable level, and because of DVB policy. However, as previously discussed in this report, the actual error rates found in our review were several times the rates reported by DVB. Benefits programs have had a number of significant changes since quality standards were established in 1966. In addition, if DVB systematically analyzed national error trends and included all errors affecting current payment in the SQC review, more meaningful and reliable information would be produced to initiate corrective action.

Recommendations

We recommend that:

a. DVB periodically reevaluate established authorization quality standards and determine their validity as acceptable quality levels for education, compensation, and pension benefits authorizations. The standards evaluation should include a determination of the cost-benefit of quality control, to include the dollar impact of erroneous payments and changes in resources, procedures, technology, or benefits programs.

b. DVB perform analyses and identify error trends in the national quality levels of authorizations.

c. DVB change the SQC review policy to include a review of previous authorization actions for errors affecting current benefits payments.

Management Response

Program management does not take exception with the cited conditions. Partial concurrence was noted with recommendations a. and b.; they do not concur with recommendation c. (see Appendix II).

Discussion

a. Quality Standards Need Reevaluation. DVB has not made required periodic evaluations to determine if authorization quality standards are valid or need revision. Evaluations have not been necessary, according to DVB officials, because reported error rates have shown the standards are appropriate. However, as previously discussed in this report, the actual error rate found in our review was several times the rate reported by DVB. In addition, benefits programs have had a number of significant changes since quality standards were established.

The current compensation and pension quality standards for authorizations have been in effect since 1966. Education Service adopted these standards for educational benefits in 1971. DVB Manual M20-2 requires that program services perform regular periodic reviews of quality standards to assure their validity. However, neither education nor compensation and pension standards have been formally evaluated or revised even though there have been significant changes in benefits programs and technology used in processing claims, and increases in the amount of benefits paid and the number of beneficiaries served.

For example, the Target computer system was implemented to improve both the speed and accuracy of claims processing. Target is designed to reduce errors by performing many computations and transactions previously done manually. Since Target, certain types of benefits authorizations, such as routine education enrollments, are now processed by adjudication personnel using Target master record information without reviewing the claims folder. Working claims without reference to the claims folder increases the chances of error because the file may contain information relevant to the claim that is not displayed on the Target screen. Thus, although Target reduces certain errors, its use without reviewing the claims folder may create other errors. The extent of this problem is not known however, because DVB officials have not evaluated the impact of the Target system on authorization quality levels.

Although DVB officials have stated that the amount of erroneous payments was considered when the quality standards were initially established, DVB has not monitored the amount of erroneous payments through the SQC review process since that time. DVB should periodically evaluate quality standards to assure that the SQC system has standards which are realistic and current.

b. DVB Quality Reviews Do Not Evaluate National Error Trends. The SQC system does not identify significant nationwide quality problems. Although errors are disclosed during SQC reviews on a case by case basis, DVB does not analyze errors to identify national error trends.

Reported results of regional office SQC reviews are not sufficiently detailed for the Central Office staff to perform complete analyses of problem areas. Exactly what types of errors are being made and the dollar impact of errors, if any, can not be determined from information routinely reported to Central Office. Central Office analyses are based primarily on information reported through the Automated Management Information System (AMIS). Information is reported in general categories which are not descriptive of the specific types of errors identified in regional office SQC reviews.

While regional offices identify errors by specific quality codes and code subdivisions (listed in DVB Manual M21-4, Appendix D), the subdivisions are not used in AMIS reporting. For example, a substantive error might be assigned quality code "12c." The code "12" means "excessive payment of monetary benefits." The code subdivision "c" indicates an "error in computation of income." This error would be reported through AMIS simply as a code "12" error. A user of the AMIS reports would be unable to tell if this error related to an error in computation of income or one of five other sub-categories which describe errors resulting in excessive payments, such as an "error in basic entitlement determination."

For substantive authorization errors, there are six basic error category codes which are used in AMIS to report results of SQC reviews. Each code has at least three and may have as many as seven subdivisions which are not reported but which are necessary for a clear understanding of error types and causes. There are five basic quality codes for judgement deficiencies, each containing from three to eight subdivisions, and there are three basic codes for procedural discrepancies, each containing from five to eight subdivisions.

The omission of this detailed type of breakdown in reporting prevents Central Office staff from making meaningful determinations of problem areas or of the dollar magnitude of errors. The results of our review, which show a significant amount of payment error and a concentration of errors in certain types of actions, demonstrate that more meaningful analyses can be accomplished with appropriate information. Results of SQC reviews should be reported more specifically and should provide information concerning the cost of errors.

No specific requirements have been established by DVB for periodic evaluations of national quality trends. Education Service and Compensation and Pension Service are responsible for evaluating the quality levels of authorizations and regional office quality reviews. However, their evaluations are performed on a regional office by regional office basis. While some DVB officials have stated that they believe national evaluations would have little use, we believe that the identification of specific error trends that have a significant impact on the system and the identification of the amounts of erroneous payments caused by authorization errors are important. These evaluations could be the basis for initiating training, revising processing or quality review procedures, clarifying manuals, regulations or other directives, and changing quality standards and reporting procedures.

c. SQC Reviews Exclude Certain Errors Which Affect Current Payments. The primary purpose of SQC is to provide an accurate measurement of current quality. The current SQC system does not provide the most accurate measurement of current quality of benfits payments. SQC reviews limit quality measurement to errors made on the most current action in cases selected for review. Thus, errors contained in previous actions which affect the current payment are not considered in the SQC process and the measurement of current quality excludes these continuing payment errors.

Instructions for SQC reviews do not clearly define current quality. DVB Program Guide PG 21-1, Section R-2, states that SQC review should include as much of the record as is required to determine the correctness of the action subject to review. It states that errors made earlier should not be reported if they do not affect the current action or come within the scope of review reasonably expected in connection with the specific action selected for review.

Central Office officials define current quality to include only those mistakes made on the action subject to review. They contend that SQC reviewers must assume the accuracy of previous actions, particularly when processing claims using the Target system without the claims folder. They believe adjudication personnel following DVB policy, which encourages claims processing without reviewing claims folders, should not be blamed for improper payments or other errors resulting from relying on the accuracy of the computer master record and prior authorization actions. By reporting only current errors as defined by Central Office officials, the impact of improper payment due to continued errors is overlooked. For example, if an action subject to review improperly authorized additional payment for a dependent who does not exist, that payment authorization is incorrect whether it was initiated by the current action or continues improper payments authorized by an earlier action. In either case, the authorized payment is improper. However, the payment error for the nonexistent dependent would be included in the reported SQC error rates only if the action selected for review initiated the erroneous payment.

To determine the significance of excluding continued errors from the SQC review, we recorded these errors separately. In the education sample the substantive error rate increased 2.4 percent, from 8.6 percent to 11.0 percent. This 2.4 percent increase represents a point estimate payment error of about $19.5 million per year. The corresponding increase in compensation and pension payment error is about $1.8 million per year.

Thus, the continuation of authorization errors is costly. By including continuing errors in reported error rates, SQC results would more accurately measure current authorization quality.

3. Current SQC Statistical Model

Finding

We believe DVB's current sampling method that requires a large SQC sample size contributes to the problem of not finding and reporting all errors because reviewers cannot devote enough time to each case. Regional offices review approximately 110,000 compensation, pension, and education authorizations a year for SQC purposes. The current method bases the sample size for each regional office on the assumption that larger populations should have larger samples. We believe this assumption is incorrect in this situation and all regional offices should have a fixed sample size. The SQC sample size could be reduced by over one-third by reducing the confidence level from 99.7 percent to 95 percent. This is still a high level of confidence and will permit reliable results. More importantly, the smaller sample size will permit sufficient time for a thorough case review. This should enable reviewers to find and report all errors and provide accurate SQC results.

Recommendations

We recommend that DVB modify the SQC sampling methodology by:

a. Establishing a confidence level of 95 percent for sample selection.

b. Establishing a fixed and equal regional office SQC sample size for education and for compensation and pension authorizations.

Management Response

Program management does not take exception with the cited condition. They do not concur with the recommendations for corrective action (see Appendix II).

Discussion

a. Reduction of SQC Sample Size. The current required annual national SQC sample size of about 105,000 education, compensation and pension authorizations is based largely on the assumption that a very high confidence level is required to evaluate quality levels. If SQC reviews are thorough (i.e., all errors are found) and a reported sample error rate exceeds the upper control limit (UCL), there is less than 1 chance in 500 that the population error rate is really under the standard at the 99.7 percent confidence level. This extremely cautious approach makes it nearly certain that there will be no "false alarms" since a reported sample error rate that is above the UCL means it is extremely unlikely that the population error rate is less than the applicable standard.

As in all quality control systems, the major assumption is that all errors in the sample will be found and reported. Both the results of our audit and the adjusted results of Central Office validations show that for every category of error in compensation, pension, and education, the true error rate is at least twice as high as reported. That is, less than one-half of the actual number of errors are found during regional office reviews. This being the case, a confidence level as high as 99.7 percent is meaningless. In fact, since the reported error rates for most error categories in compensation, pension, and education are below the applicable upper control limit when every error rate actually exceeds the upper control limit, the real confidence level is near zero.

The accuracy of regional office reviews must be improved if the SQC process is to have any value. Earlier in the report we stated that one of the causes of unreliable SQC data was SQC reviewers not spending enough time reviewing cases to identify all errors. The amount of time per case review can be improved by increasing the staff resources allocated to SQC reviews or by reducing the required SQC sample sizes. Budget constraints may make increased resource application to the SQC function unlikely, even if justified. Therefore, we propose that the review process can be improved by reducing the sample sizes based on a reduction in the confidence levels used in the SQC process.

A reduction in confidence level from 99.7 percent to 95 percent would permit a sample size reduction from the present requirement of 105,000 cases a year to about 69,000 cases a year. This is a caseload reduction for reviewers of 36,000 a year, which increases the time available for SQC reviews by 34 percent.

A 95 percent confidence level means that if a sample error rate is above the UCL, there is about 1 chance in 40 that the population error rate is really below the standard. This is still a high level of confidence and, most importantly, would permit a more effective use of existing resources to improve the reliability of SQC results. The sample requirements can be reduced by establishing uniform sample sizes for all regional offices.

b. Fixed Sample Size for All Regional Offices. There are three regional office SQC sample size categories. The sampling method currently used by DVB requires larger samples from larger regional offices:

Regional Office Size Category	Annual Sample Size	
	Education	Compensation & Pension
I (large)	1,440	1,728
II (medium)	720	960
III (small)	288	336

Category I offices' authorization workload is about equal to the combined workload of category II and III offices. Category III offices account for only 5.4 percent of compensation and pension authorizations and 11.2 percent of education authorizations.

There are some problems resulting from assigning both education and compensation and pension SQC sample sizes according to three general size categories. The three categories do not take into account the differences between education and compensation and pension workloads at specific regional offices. For example, some regional offices have large compensation and pension workloads and relatively small education workloads. Further, a number of offices were not properly categorized according to their workload. At least five stations were improperly categorized according to their separate education and compensation and pension workloads. That is, some offices in a higher size category had smaller education or compensation and pension workloads than offices in a lower size category. Similarly, at least six offices were improperly categorized based on combined education and compensation and pension authorization workloads.

Modifying regional office SQC sample size requirements will eliminate problems resulting from sample size categories and reduce the overall sample size while improving the precision for small regional offices and maintaining the current precision levels for larger regional offices. This can be accomplished by fixing the sample size for all regional offices for education and for compensation and pension authorizations. The fixed sample size table below is appropriate for almost every regional office and is based on a sample size of 50 per month for either education or compensation and pension authorizations. The total SQC sample required for both types of authorizations at 95 percent confidence is 100 per month, or 1,200 per year.

Annual Workload	Annual Precision 1/	UCL	Monthly Precision 1/	UCL
180,000 2/	± 1.36%	4.36%	± 4.72%	7.72%
50,000 3/	± 1.36%	4.36%	± 4.70%	7.70%
12,000 4/	± 1.33%	4.33%	± 4.61%	7.61%
2,800 5/	± 1.21%	4.21%	± 4.19%	7.19%

In comparison with current precision and UCL's, the effects of this modification are:

For large offices (workload over about 70,000), precision changes from ± 1.34 to ± 1.36 percent (annual) and from ± 4.65 percent to ± 4.72 percent (monthly). This is slightly (but insignificantly) worse that it is under the current system.

For mid-sized offices (workload from 12,000 to 70,000), precision changes from ± 1.90 to ± 1.36 percent (annual) and from ± 6.58 to ± 4.70 percent (monthly). This is a 28 percent improvement over the current system.

1/ Precision for 3 percent standard for sample size of 50 cases per month.
2/ Largest annual regional office workload.
3/ Average annual regional office workload.
4/ Average category III regional office workload.
5/ Smallest regional office workload.

Annual and monthly precision would be better for very small offices than for large ones at a fixed sample size of 50 per month. This is because their workloads (populations) are statistically "small." There are eight offices with either an education or compensation and pension authorization workload of less than 12,000 per year. For these few regional offices a monthly sample size of 45 will produce results comparable to what a sample size of 50 will do for the larger offices. Thus, for small offices (workload under 12,000), precision changes from ± 3.0 to ± 1.3 percent (annual) and from ± 10.4 to ± 4.7 percent (monthly). This is more than a 100 percent improvement although these few offices will have to increase their sample size.

We believe the modifications suggested will improve the overall effectiveness of the SQC system. The modifications will reduce the number of SQC review cases by 34 percent compared to the current system, making more time available for thorough case reviews without increasing resources. Large offices will have their caseload reduced by nearly two-thirds and medium sized stations will have their caseload reduced by one-third. The offices now in category III will have a SQC review caseload increase of about 73 percent, from 52 actions per month to 90 per month. However, there are some category III offices that should be in category II based on their authorization workloads.

4. Quality of Adjudication Authorizations

Finding

Authorization error rates are too high and are resulting in significant amounts of erroneous payments. Although the main purpose of the audit was to evaluate the effectiveness of the SQC system, we did identify types of errors that had a significant impact on the quality of adjudication authorizations and the proper payment of benefits. The most significant problems involved income calculations, choice of effective dates, training time calculations, and dependency issues. Erroneous income calculations were the most numerous substantive errors found and accounted for 71 percent of the actual payment errors in the compensation and pension sample. Dependency determination errors were common in both the education and the compensation and pension samples. Procedural errors in assignment of end products showed that the volume of adjudication authorizations produced is overstated by about 2 percent. These errors affect the productivity data used in quantitative measurement of adjudication operations. Listings of frequently occurring errors are shown in Exhibits 4 through 9.

The audit did not attempt to identify quality problems at particular regional offices or to identify the causes of significant error types. However, the audit results identified common problems areas requiring DVB quality improvement action.

Recommendation

We recommend that DVB improve authorization quality by determining the underlying causes of specific problem areas and initiating actions to improve quality. To accomplish this objective, DVB should evaluate the need for specialized training; simplifying regulations, manuals, or other guidelines; revising claims processing procedures such as work specialization or changes in Target processing procedures; or improving supervision to emphasize quality.

Management Response

Program management does not take exception with the cited conditions. They do not concur with this recommendation for corrective action (see Appendix II).

Discussion

Payment errors caused by erroneous income calculation were highly significant in the compensation and pension sample. Cases in our sample involving this type of determination were those with end products 150, 190, and 290. These types of cases represented 36 percent of all cases sampled yet they accounted for 42 percent of all substantive errors, 75 percent of all actual overpayments, 65 percent of all actual underpayments, and 71 percent of all total actual payment errors.

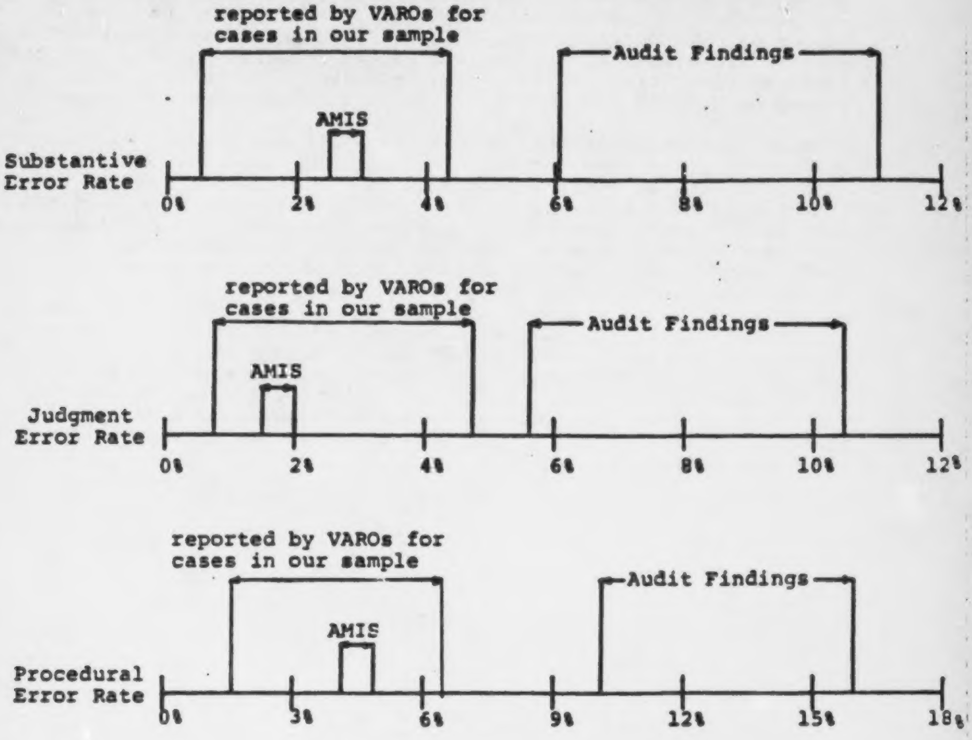
Improper effective or ending dates and training time calculations were the most common substantive errors in the education sample, accounting for 62 percent of the errors. These types of errors alone exceeded the UCL for the 3 percent standard and a sample size of 501. Incorrect effective dates accounted for 23 percent of the compensation and pension substantive errors.

Dependency errors were significant in both the compensation and pension and the education samples. Payment for the wrong number of dependents accounted for 12 percent of the education substantive errors and 10 percent of the compensation and pension substantive errors. In addition, dependency issues accounted for 29 percent of the compensation and pension judgement errors.

We found enough procedural errors involving end product assignment to question reported DVB adjudication authorization workload data used to measure productivity. Different types of authorizations are valued differently for comparing time required with time "earned" in order to measure productivity. For example, the value of education end product 220 is .54 "earned" standard staff-hours. About one-third of all procedural errors were caused by the wrong end product being taken. In half of these cases, an end product for "earned" time was taken when end product 930 — (to correct an error, no credit earned) was appropriate. These types of procedural errors result in the volume of education, compensation and pension authorizations being overstated by about 2 percent a year. We did not determine the impact that the assignment of incorrect end product codes would have on staffing requirements, nor did we verify the validity of workload measurement standards.

Exhibit 1

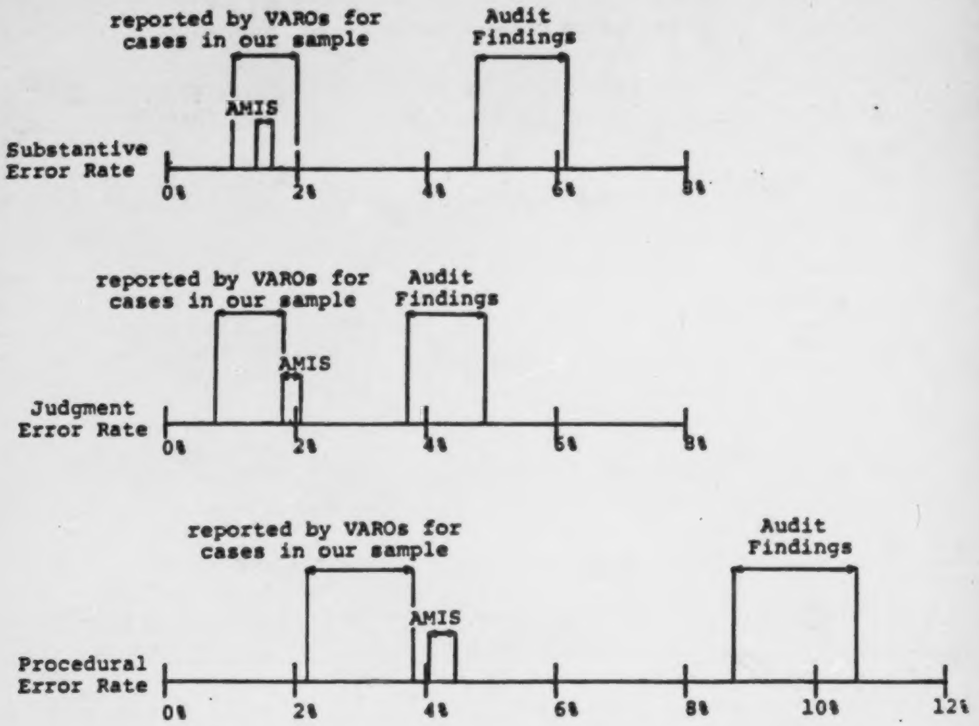
EDUCATION ERROR RATE RANGES AT 95 PERCENT CONFIDENCE



DATA SOURCE	ERROR RATES: EDUCATION CASES		
	substantive	judgment	procedural
AMIS report (12 months)	2.7%	1.7%	4.6%
reported by VAROs for cases in our sample	2.4%	2.8%	4.0%
Audit Findings	8.6%	8.0%	13.2%

Exhibit 4

COMPENSATION AND PENSION ERROR RATE RANGES AT 95 PERCENT CONFIDENCE



DATA SOURCE	ERROR RATES: C&P CASES		
	substantive	judgment	procedural
AMIS report (12 months)	1.5%	1.9%	4.2%
reported by VAROs for cases in our sample	1.5%	1.3%	3.0%
Audit Findings	5.4%	4.3%	9.7%

Exhibit 3

PROJECTED ANNUAL PAYMENT ERROR RANGES

Education Payment Error Ranges

Type of Error	Point Estimate of Annual Payment Error	Payment Error Range at 95% Confidence
Actual payment error due to the current action under review	$23.2 million	$8.6 million to $37.8 million
Actual payment error in current action due to previous error	$19.5 million	$2.5 million to $36.5 million (90% confidence)
Combined payment errors	$42.7 million	$17.9 million to $67.6 million

Compensation and Pension Payment Error Ranges

Type of Error	Point Estimate of Annual Payment Error	Payment Error Range at 95% Confidence
Actual payment error due to the current action under review	$34.7 million	$22.0 million to $47.4 million
Actual payment error in current action due to previous error	$1.8 million	Indeterminate
Combined payment errors	$36.6 million	$23.7 million to $49.5 million

Exhibit 4

DISTRIBUTION OF EDUCATION SUBSTANTIVE ERRORS IN SAMPLE

Error Description	Number of Errors	Percent of Substantive Errors
Incorrect ending or effective date	20	46 percent
Wrong training time	7	16 percent
Paid for wrong number of dependents	5	12 percent
Incorrect payment rate made input	3	7 percent
Incorrect interval payment	2	5 percent
Other errors	6	14 percent
Totals	43	100 percent

NOTE: The combination of errors due only to improper ending or effective dates or wrong training time exceeds the upper control limit for a sample size of 501 and a 3 percent error rate standard.

Exhibit 5

DISTRIBUTION OF EDUCATION JUDGMENT ERRORS IN SAMPLE

Error Description	Number of Errors	Percent of Judgment Errors
No development for prior credit	7	18 percent
Claimant inaccurately notified about benefits	6	15 percent
School liability not reported	6	15 percent
No development for mitigating circumstances	4	9 percent
Unnecessary development	3	7 percent
Other inadequate development	7	18 percent
Other errors	7	18 percent
Totals	40	100 percent

Exhibit 6

DISTRIBUTION OF EDUCATION PROCEDURAL ERRORS IN SAMPLE

Error Description	Number of Errors	Percent of Procedural Errors
Incorrect end product	20	30 percent
Improperly took end product on card	14	21 percent
Incorrect data on input document	12	18 percent
Inaccurate notice to claimant	6	9 percent
Input document not properly signed	4	6 percent
Other errors	10	16 percent
Totals	66	100 percent

NOTE: The two error types involving end products, when combined, result in an error rate that exceeds the upper control limit for a sample size of 501 and a 3.5 percent error rate standard. There are enough cases where the wrong end product was taken to affect data used for productivity measurement. About one-half of the time a wrong end product was taken, EP 220 was taken when EP 930 (corrective action, no work credit earned) was correct. The national impact of this type of error is to overstate education (end product 220) workload by about two percent a year.

Exhibit 7

DISTRIBUTION OF COMPENSATION AND PENSION SUBSTANTIVE ERRORS IN SAMPLE

Error Description	Number of Errors	Percent of Substantive Errors
Incorrect income calculation	89	42 percent
Incorrect effective date	49	23 percent
Paid for wrong number of dependents	22	10 percent
Incorrect payment of burial-related benefits	16	8 percent
Miscellaneous incorrect rate payment	13	6 percent
Incorrect adjustment due to hospitalization	11	5 percent
Other errors	13	6 percent
Totals	213	100 percent

NOTE: The errors categorized as "other" affected such issues as service severance or retired pay and apportionment of benefits payments.

Exhibit 8

DISTRIBUTION OF COMPENSATION AND PENSION JUDGMENT ERRORS IN SAMPLE

Error Description	Number of Errors	Percent of Judgment Errors
Improper development of dependency issue	49	29 percent
Improper development of income or net worth	36	22 percent
Inaccurate notification to claimant	18	11 percent
Incorrect address used	11	7 percent
Failure to invite an election or notify claimant of eligibility	9	5 percent
Failure to refer case to rating board	9	5 percent
Other errors	35	21 percent
Totals	167	100 percent

NOTE: "Other" errors included development deficiencies involving military retired pay, hospitalization, military service, burial expenses, apportionments, and unnecessary development.

Exhibit 9

DISTRIBUTION OF COMPENSATION AND PENSION PROCEDURAL ERRORS IN SAMPLE

Error Description	Number of Errors	Percent of Procedural Errors
Incorrect end product	132	35 percent
Incorrect information made input	84	22 percent
Input document not properly signed	46	12 percent
No annotation of review for service connected death (end product 160 only)	32	8 percent
End product taken before earned	18	5 percent
Improperly took end product on card	18	5 percent
Other errors	50	13 percent
Totals	380	100 percent

NOTE: "Other" procedural errors included incomplete notices to claimants, failure to clear or improper clearing of controls, and failure to notify other agencies of award actions. There are enough instances in compensation and pension actions where the taking of a wrong end product affects data used in productivity measurement. About one-half the time a wrong end product was taken, either no end product or end product 930 (corrective action, no work credit earned) was correct. The national impact of this type of error is to overstate the compensation and pension authorization workload by about 1.7 percent a year.

APPENDIX I

AUDIT AND ANALYSIS METHODOLOGY AND DEFINITIONS

The audit of the Veterans Administration's statistical quality control system involved five basic steps: determining the sample size, selecting cases, reviewing cases, verifying errors, and analyzing results.

A planned sample size of 4,000 compensation and pension end products and 500 education end products was based on our estimates of error rates and desired precision. For compensation and pension cases, we estimated an error rate of 3.5 percent and selected a sample size for 1 percent precision. For education cases, we estimated an error rate of 10 percent and selected a sample size for 4 percent precision. For sampling purposes, we used a confidence level of 99.7 percent, the equivalent of 3 standard deviations.

All VA regional offices were sampled in proportion to their share of the total Agency workload and end products. The sample was randomly selected from the 12 month period June 1980 to May 1981. Final sample selections were analyzed to insure random distribution and a proper proportion of various end products and pending issues. Source documents for sample selections included quality review case listings and quality reports from VA regional offices and pay listings from the Hines Data Processing Center. For both the education and the compensation and pension samples, half of the cases selected had been reviewed for quality by VA regional offices. The actual number of cases reviewed, 501 education and 3,927 compensation and pension, differed slightly from the planned sample sizes because of adjustments made to sample proportionately from all regional offices and because not all cases requested were available. The audit team reviewed cases for substantive, judgement, and procedural errors in accordance with DVB quality review procedures. In every instance where the audit team found an error, the case was sent to VA Central Office for verification. The verification process resulted in some changes in error classifications and in some additions or deletions of errors. All issues were resolved and these mutually agreed upon results were used for our analysis.

We analyzed the results to determine error rates (attributes) and payment errors (variables). The number of errors divided by the sample size produced a point estimate error rate for analysis using DVB quality control tables. We also calculated the achieved precision to determine a true range of error rates for comparison with error rates previously reported by DVB.

The results of the audit sample of compensation and pension authorizations included some education actions in order to be comparable to regional office compensation and pension authorization SQC results. During the time frame of the audit review all end product 130 dependency actions, including education actions, were included in the compensation and pension SQC samples. As a result, regional offices usually included these education cases in their compensation and pension authorization SQC results. The audit results were compiled in the same way in order to be comparable to the reported regional office SQC results. Excluding the education cases from the compensation and pension sample provide results that are more representative of the compensation and pension program but that are not comparable to the SQC error rates reported by regional offices. For example, excluding education cases from the compensation and pension sample reduces the substantive error rate from 5.4 percent to 5.2 percent. The 5.4 percent rate is appropriate for determining the accuracy of the error rates reported by regional offices. The 5.2 percent error rate is representative of the error rate in the compensation and pension program. According to DVB officials, recent changes to SQC sample selection procedures now include education end product 130 actions in the education SQC sample listings instead of in the compensation and pension listings as was the practice during the timeframe of the audit review.

The amount of payment error in a sample divided by the sample size produced a point estimate of the amount of error per case. This amount multiplied by the annual workload produced a point estimate of the annual payment error. We also calculated the achieved sampling error to determine a range of payment error. Overpayments, underpayments, and total payment error were analyzed separately.

The statistical formulas used for sampling and analysis were:

for sample size:

$$n = \frac{(Z^2 N)\,(e)\,(1-e)}{(p^2 N) + ((Z^2)\,(e)\,(1-e))}$$

for precision:

$$p = Z\sqrt{\frac{(e)\,(1-e)}{n}}$$

for sampling error:

$$SE = s\sqrt{\frac{Z^2}{n}}$$

where: e = error rate in decimal form (e.g., 1% = .01)

n = sample size

N = population size

p = precision (applies to attributes)

s = standard deviation

SE = sampling error (applies to variables)

Z = number of standard deviations for desired confidence level

The following terms are used throughout the audit report and reflect the usage shown in DVB quality control manuals and directives.

Quality Control. A systematic approach for determining whether quality is being maintained at an acceptable level. The elements of quality control include uniform measurement and determination of the quality level, and taking corrective action to remove the causes of poor quality.

Qualitative Measurement. The determination of the actual quality level using quality control and review methods. Qualitative measurement findings are interpreted only as to their relation to established standards or goals.

Quality Review. The process of measuring or comparing work performed with applicable requirements.

Statistical Quality Control (SQC). A quality measurement and review technique using statistical means to detect the presence of nonrandom variations in the output of a process.

Quality Standards. The criterion that expresses the acceptable level of quality for quality measurement and evaluation purposes. For DVB adjudication authorization actions, the standards are expressed in errors per 100 cases.

Error. Any nonconformance in a work unit with specified requirements. For quality review purposes, there are three major categories of errors: substantive, judgement, and procedural.

Substantive Error. An erroneous action or decision which results in or could result in the improper payment of benefits or the grant or denial of other entitlement rights to veterans or their dependents. Substantive errors are the most serious type of errors.

Judgement Deficiency. An error that exists because a more logical or defensible determination is justified based on the facts of record and the applicable regulations.

Procedural Discrepancy. Errors of noncompliance with manditory procedures which do not affect the payment of benefits or determinations of entitlement.

Quality Level. The average quality of work units estimated on the basis of quality reviews of samples of work units produced during the previous 12-month period. Shorter time periods of not less than six months may be used if a significant change has occurred in the quality level.

APPENDIX II

DEPARTMENT OF VETERANS BENEFITS RESPONSE AND AUDIT COMMENTS

To: Inspector General (50)

Date: May 14, 1982 Subj: Draft Report, IG SQC Audit

1. The IG staff over the past year has conducted a study of the Department of Veterans Benefits Statistical Quality Review system for adjudication authorization actions. The proposed findings from the study have been discussed in a number of joint meetings held between our respective staffs.

2. We have some general comments concerning the draft and the study. There appears to be a basic difference as to the function of the SQC system in the management of claims processing and payment authorizations. The IG audit in its purpose designates the SQC process as the primary control mechanism. SQC is very important to DVB, but it is only one of several management tools used to determine if the benefits delivery system is operating and functioning as intended. Whereas the draft report is oriented to an auditor's view of the potential numbers that may be involved, we look at SQC as a means of recognizing problem areas in the regional offices individually, and the system as a whole, to identify underlying causes and management actions needed to accomplish long term improvements through elimination of those causes which can be eliminated.

3. One of the general conclusions in the draft report is that the SQC system was not effective in measuring the quality levels of payment authorizations. The audit results show higher error rates than reported by the regional offices. There is a flaw in this conclusion because the IG audit was not an original review of authorization actions. The IG auditors had the benefit of reviewing cases 6 months to 1 year following the authorization actions. Errors found and corrected by the regional offices as well as the central office SQC reviews were already identified for the auditors. Many of the education errors were corrected through routine processing or benefit payment inquiries. This made evidence available to the IG team not available to those who reviewed the cases immediately following taking of the action. At least 50 percent of the total errors found in the audit had been identified before the IG audit was made. Successive quality reviews of authorization actions are very likely to result in identification of additional errors since persons performing the subsequent reviews always have the errors identified from the prior case reviews.

Audit Response

> The Departments' comments do not adequately address the principal problem of the inaccuracy of regional office SQC reviews. DVB's contention that errors are more easily detected on subsequent reviews done later in time does not adequately explain why our projections of actual error rates are at least 2-3 times higher than error rates reported by regional offices. Our analysis of the types of errors not being identified in SQC reviews shows that they should be found in thorough quality reviews done by competent SQC reviewers. To be effective, a quality measurement function must disclose all of the attributes - errors - of the sample of transactions selected. If SQC reviews only disclose one-third to one-half of the actual erroneous transactions, projections of the error rate to the total population have little value and are misleading to Department managers.

4. We believe the omission of payment error ranges in dollar amounts and the number of cases in each range severely distorts the impression conveyed by the draft audit report. Such information has previously been included in audit reports such as the education accounts receivable audit 52-79-1. In order to provide a basis from which the stated findings and conclusions were derived, we feel this information and the actual amounts of payment in error for each case should be included in the audit report.

As regards the conclusion that regional office SQC reviews are not effective, we believe it would be necessary to include data and analyses comparing the SQC and independent sample error rates. We strongly object to payment in error projections based upon judgment deficiencies. The payment in error projection assumes that every judgment error will result in an overpayment or underpayment. The fact is that a judgment deficiency often times does not result in payment error because the documenting evidence, although not of record at the time of action, does exist.

The draft report asserts that "unsupported payments" could range from 0 to $171 million in overpayments and $12.5 million in underpayments. If an estimated 50 percent of the judgment errors result in actual payment errors, the unsupported payments projected in the audit report is reduced by 50 percent. We expect at least 50 percent of the actual errors to be shortly detected and corrected because approximately this percentage of the substantive errors found by the IG auditors had been corrected before the IG audit. These expectations show that there is too much conjecture in any such dollar projections.

Audit Response

> Payment error totals and payment error rates found in the review are shown on pages 6-7. Projected payment error ranges are shown in Exhibit 3. During the audit briefing

> process we furnished DVB staff with copies of detailed working papers supporting our report conclusions. This supporting data included individual erroneous payment amounts, computations for statistical projections, and the breakdown of the results from the independent sample and from the sample of cases subject to SQC review. The summary results properly reflect the results of both sample segments.
>
> By program definition, the evidence of record did not support the authorized level of potentially erroneous payments due to judgement errors. Therefore, we cannot assess the validity of these payments. If, however, 50 per cent of the unsupported payments, as suggested by program management, are improper, the cost would approximate $91 million annually.

5. The proposed audit report has been circulated, and the views of the Department on the recommended actions are as follows. The report essentially made 8 recommendations. Comments are directed to each individually.

6. Recommendation 1: Reassign the SQC function from first line supervisors to an independent technically competent staff at regional offices.

Our SQC system makes first line supervisors responsible for conducting initial quality reviews. These are unit chiefs who have had experience as adjudicators, rating board members, or supervisors and have the best technical knowledge of the programs. Our programs are not static. Establishing independent staffs to perform SQC reviews would have significant disadvantages. In addition to requiring additional personnel, these non-supervisors would lose their expertise by not dealing with claims on a daily basis. Daily contact with the adjudication process is necessary to maintain skills.

We do not agree with this recommendation because quality control and improvement are supervisory functions best performed by the adjudication unit chiefs.

Audit Response

> The fact remains that under the present process supervisors are not finding and reporting all erroneous adjudication actions. The audit disclosed that actual error rates exceeded those reported by supervisory personnel by a substantial margin. The present system of having personnel review a procedure they are responsible for supervising presents a basic conflict of management responsibility.

7. Recommendation 2: Revising the procedures used in CO independent validations to emphasize the evaluation of the accuracy and reliability of RO SQC reviews. The validation sample should be selected from authorizations included in RO SQC reviews rather than being an independent sample.

The draft report states that the CO SQC validation reviews are ineffective because the independent samples used are not representative of the station SQC samples, and the independent review results are not effective in identifying the scope of quality problems.

The CO C&P Service SQC validation reviews resulted in lower error rates than the IG audit because "de minimus" dollar mistakes were not recorded as errors. This informal policy has been corrected and such errors will be recorded in the future. The CO independent samples were selected from shorter time frames than the RO samples, 1 or 2 months vs. 12 months, but the lower error rates were due to an informal policy and not the nature of the sample. The independent samples are selected from an infinite population of an ongoing work process. If the CO validation reviews were limited to cases previously reviewed at the field stations, biases that might occur in the initial selection of cases for review are not likely to be discovered. We do not agree with the recommendation that only cases previously reviewed be utilized for the CO validation reviews.

Audit Response

> Drawing validation samples from regional office SQC samples should reduce the risk of bias in both regional office SQC results and VACO validation reviews. Regional office staff will be aware that their SQC results will be subject to direct Central Office oversight. This increased awareness should help improve the completeness and accuracy of regional office SQC reviews.
>
> In addition to providing more meaningful data on the quality of SQC reviews, properly selected samples from previously reviewed cases will provide the same type of information on the quality of adjudication authorization as will an independent sample. The audit results have shown the need for a more direct and effective approach in Central Office oversight of regional office SQC review quality. DVB should retain the capability to select independent samples for use when initial validations indicate serious problems or for special studies.

> The Department indicates that some of the other practices limiting the effectiveness of VACO validation reviews are being corrected, such as identifying multiple and "de minimus" errors and including dependency actions in validation samples. However, in order for validation review results to be representative, the Department needs to ensure that validation conclusions are limited to the time frame and population from which the samples were selected.

8. Recommendation 3: DVB should periodically reevaluate established authorization quality standards and determine their validity as acceptable quality levels for education, compensation, and pension benefits authorizations. The standards evaluation should include a determination of the cost-benefit of quality control, to include the dollar impact of erroneous payments and changes in resources, procedures, technology, or benefits programs.

We agree that established standards should be reevaluated periodically. Should there be sustained evidence of an improved quality level, the standard should be revised downward to conform to the new and better quality level. An upward revision of a standard should not be made unless there is strong evidence that changes of a permanent nature have taken place which make it inevitable that with the same or no more attention paid to quality than before, the process average error rate will increase.

Quality standards (acceptable quality standards) cannot be set scientifically. They must be set primarily on the basis of good judgment by program chiefs as to the best quality levels the operations are capable of producing with available resources. In practice, acceptable quality levels are a compromise between the capability of the producing organization and the needs of the clientele served.

The inclusion of projected dollar amounts of error in the standards would detract from the primary concern of our SQC system which is control of quality and not a financial examination. Dollar amounts would change the emphasis and purpose of SQC because one unusual case with a $1,000 error could project into nearly a million dollars of erroneous payment, while a large number of minimal dollar errors are likely to get limited attention because of the low dollar impact. Dollar amounts in standards would require judgment decisions as to whether errors were unusual. The estimated dollar impact of errors could be a factor in decisions to revise standards upward or downward, but should not be included in the standards.

Audit Response

> The sixteen year period that the established standards have been in effect, coupled with legislated program changes that have evolved over the same

period, as well as transformation of the delivery system from paper bound, batch-oriented processing to an on-line system utilizing video display terminals all argue for priority development of revised standards.

The introduction of dollar impact information adds a dimension to management's decision making ability that should increase the quality of judgements made. Standard statistical formulas can be applied that take into consideration the frequency of errors and their value, whether large or small, to project the monetary impact on benefits payments.

9. Recommendation 4: DVB should analyze and identify error trends in national quality levels of authorizations.

We agree with this recommendation. Members of the C&P service have informally discussed with staff personnel the need for Data Management and Telecommunications providing error code subdivisions in the AMIS reporting system as part of an overall change to the management reporting system. Program change priorities have been the inhibiting factor in accomplishing this improvement.

10. Recommendation 5: DVB should change the SQC review policy to include a review of previous authorizaton actions for errors affecting current benefit payments.

The purpose of our SQC reviews is to control the current quality of adjudication actions. The review should be directed to as much of the record as is required to support the correctness of the current action. Historical errors which do not affect the current action are not within the scope of our review. SQC reviewers do however go beyond the confines of a current action in the interest of overall quality improvement as opposed to recording exceptions for statistical measurement of the quality level. Therefore, we are not hesitant in identifying prior errors and utilizing them to strengthen the overall authorization quality even though prior errors are not included as chargeable errors for the current action.

Errors made years in the past may be of no consequence to current activities since we have a viable system in which procedures and regulations change. They do have an educational importance for the regional office, but our concern is how we are operating today under current laws and procedures and not in the past.

We do not agree with this recommendation because the purpose of the SQC system is to control the current quality of adjudication actions.

Audit Response

> The audit demonstrated that DVB does not control the current quality of adjudication actions. We have quantified the effects of current procedures and reported them in the narrative preceding this recommendation. Our tests counted only those errors which affected current actions. Based on the audit results, the substantive error rate for education would be raised by 2.4 percent from 8.6 percent to 11.0 percent with an estimated value for the additional 2.4 percent of $19.5 million per year if all errors with an effect on current quality were counted.

11. Recommendation 6: DVB should modify the SQC sampling methodology by establishing a confidence level of 95 percent for sample selection and quality evaluation purposes.

The use of a 3 standard deviation confidence level was a decision by the Department supported by recommendations from qualified mathematical statisticians with extensive experience in quality control who assisted in developing the SQC system. While control limits may be set at any desired levels, the 3 standard deviation control limits have become standard industrial practice. We believe the confidence level used should continue to be a prerogative of DVB management based on relative importance in estimating quality levels and related uses of SQC data for performance evaluation and merit pay purposes. Use of a 95 percent confidence level would not improve the SQC system as a means of identifying the causes of quality defects to enable management to eliminate causes, and to accomplish long term improvements. We do not agree with the recommendation to establish a 95 percent confidence level, and believe that continued use of a 3 standard deviation confidence level is best for DVB-wide quality control and improvement purposes.

Audit Response

> The audit explored use of the 95 percent level as a means of allowing additional time for case review at regional offices (we estimate an overall reduction of 34 percent from the sample currently required) because they are finding significantly fewer errors than actually exist. For any SQC system to be viable, essentially all errors must be identified. Since the error rates found by the audit and confirmed by DVB quality review staff are substantially higher than error figures reported, the actual confidence level is near zero. System accuracy would be greatly increased by testing fewer items, permitted by lowering the confidence level to 95 percent, and finding all erroneous actions. A similar quality control system, used by the Social Security Administration to evaluate entitlement and payment determinations in the AFDC program, uses a 95 percent confidence level.

12. Recommendation 7: DVB should modify the SQC sampling methodology by establishing a fixed and equal regional office SQC sample size for education and for compensation and pension authorizations.

The establishment of fixed and equal SQC sample sizes for education and for compensation and pension authorizations at all regional offices will result in a disproportionate workload imposed on the small stations that have only 1 or 2 claims units, as compared to the larger stations that have up to 14 claims units. The amount of time that would be required by the unit chiefs to perform the SQC function at those small stations would be considerable when compared to the larger stations, where the same SQC workload would be distributed to a greater number of unit chiefs. In addition, since the quality produced by individual regional offices varies, in order to estimate the quality of the total departmental workload, a more representative size sample based on the workload of offices should be used.

A review of 50 education cases a month at San Francisco would result in a quality review of .3% of that stations annual education workload. Reviewing 45 education cases a month at White River Junction would result in a quality review of 22.5% of their annual education workload. Fixed sample sizes would appear to lead to inequities among stations with varying degrees of workload.

We do not agree with the recommendation, and believe that the more representative size sample based on a total workload of each regional office should continue to be the basis for sample size determination.

Audit Response

> A nationwide reduction of 34 percent in cases required for SQC reviews would be achieved through use of a 95 percent confidence level. The 34 percent reduction in case reviews for quality means a nationwide reduction of 36,000 cases to be reviewed annually. This reduction is nearly five times the total quality review caseload proposed for small offices. We believe the DVB can factor a savings of this magnitude into their staffing allocations for small offices to compensate for the increased review caseload at those locations.
>
> With respect to the argument for more representative sampling based on regional office workload, Professor of Statistics Herbert Arkin, in his Handbook of Sampling for Auditing and Accounting (p.69), points out that, "the often

> believed intuitive feeling that a fixed proportion of the field will be required to give identical sample precision ... is simply not true." This means that, statistically, no purpose is served in examining more cases than required by the formula for the confidence level selected.

13. Recommendation 8: DVB should improve authorization quality by determining the underlying causes of specific problem areas and initiating actions to improve quality. To accomplish this object, DVB should evaluate the need for specialized training; simplification of regulations, manuals, or other guidelines; revision in claims processing procedures such as work specialization or changes in Target processing procedures; or improve supervision with greater emphasis on quality.

Adjudication division personnel at regional offices undergo formal training every week. When the SQC review points out specific problem areas, education training sessions are usually designed for the authorization personnel to solve the specific quality problems. Education programs are also used to train and crosstrain personnel in the adjudication division to help management improve overall division quality.

Central office administrative issues are continuously provided to help regional offices improve overall quality. Simplification of these publications is a CO objective, but the quality problems are often complex and we try to avoid providing oversimplified solutions.

The adjudication division claims processing and work flow procedures were recently revised and are subject to ongoing review for improvement. Representatives from Central office visit regional offices to analyze work flow and other division problems as a basis for suggestions to improve timeliness and the quality of work.

Recommendations to simplify, revise or eliminate unworkable procedures have always been the function of the Department appraisal visits. Changes in the Department's benefits delivery system are currently under study by the CBD's Management Advisory Committee.

Each regional office is analyzed at least semi-annually by consultants from Central office who review regional office management reports and make suggestion for quality improvement. These consultants review the adjudication divisions education training programs, review the SQC errors found, and compare the SQC results with the CO SQC validation review.

Many changes are underway, partly as a result of the audit, findings, but also as a result of our own initiative. In the area of dependency, for example, Target edits were installed to match dependents and birth dates. Although installed after the audit, the need was observed and action was initiated independently of the audit.

We have been accomplishing the items in this recommendation since we already evalute the regional offices need for education training, simplify administrative issues, periodically visit regional offices to review claims processing techniques, and make suggestions to division management for quality improvement on a continuing basis.

Audit Response

> The program response, in this instance, constitutes a denial that the error condition presented in our discussion exists. We do not take exception to the DVB statements that the activities described do occur. We are aware that many of them do. On the other hand, DVB needs to reassess the effectiveness of the techniques they describe since the conditions revealed by this audit have implications which should be addressed on a priority basis. This point is illustrated by our last finding -- the nationwide overstatement of DVB authorization workload by 2 percent due to procedural errors.

14. The IG data also reveal that 49 of the total C&P substantive errors found out of 213 total substantive errors were concentrated in 5 stations. It is obvious that there are significant quality problems at these 5 stations, but to assume that the entire C&P program has these quality problems is not valid. Similarly in the education program, 17 of the total substantive errors found out of 57 total substantive errors were concentrated in 3 stations.

15. In summary we have found the study to show the importance of the SQC system to the compensation and pension and education services. As we previously indicated and pointed out in our discussions, the emphasis on dollar projections subverts the accomplishment of a study which is directed towards an assessment of the operation of a management tool. As such, it is not a value to us in identifying causes of errors and preventing errors on a national basis, and we would recommend that such emphasis be eliminated or made only on a reference in a final report.

16. We do not agree with most of the recommendations in the draft report for the reasons given above. The audit data provide a useful review of the SQC system for management of claims processing and payment authorizations. We will utilize the audit findings in our continuing effort to identify the underlying cause of quality defects as a basis for determining management action required to eliminate those causes of defects which can be eliminated, and thereby accomplish long-term improvement.

/Signed/
DOROTHY L. STARBUCK
Chief Benefits Director (20)

Veterans
Administration

Memorandum

Date: JAN 8 1987

From: General Counsel (02)

Subj: Allegations of Reprisal for Testimony in National Association of Radiation Survivors v. Turnage, Civ. Act. No. C-83-1861-MHP (U.S.D.C. N.D. Cal.)

To: All Supervisors in the Department of Veterans Benefits

1. On January 7, 1987, Judge Marilyn Hall Patel received information indicating that one or more Veterans Administration supervisors may have taken action against one or more employees in reprisal for testimony in this action. It is alleged that this reprisal included efforts by supervisors to restrict access of employees to other employees within the Veterans Administration and to use derogatory statements to injure the reputation of employees who fulfilled a lawful duty to testify at court proceedings.

2. We have been informed by the Department of Justice that these allegations, if true, could possibly constitute obstruction of justice, contempt of court and prohibited personnel practices in violation of 5 U.S.C. 2302(b). We understand that these allegations are under review for referral for prosecution to the Criminal Division of the Justice Department and that Judge Patel may also take action to prohibit reprisals, using the sanction of contempt. In addition, if a petition were filed with the Special Counsel of the Merit System Protection Board and the Special Counsel found upon investigation a prohibited personnel practice occurred, he could take any number of actions including fining the supervisor or removing him from the federal service.

3. You are advised that this agency will not tolerate any adverse employment action taken against any person for testifying, participating or otherwise cooperating in any court proceeding, including this case. We have been informed that Judge Patel views this matter seriously, as do we, and the court has indicated that any adverse action against any such person will be presumed to be an unlawful reprisal. In the absence of proof to the contrary, the individual taking any such action may be subject to contempt, criminal prosecution or civil action in accordance with the Civil Service Reform Act.

Donald L Ivers

DONALD L. IVERS
General Counsel

Questions for NARS vs Turnage Hearing

March 17, 1987

from

Honorable Gerald Solomon

To Ronald Abrams, VA Central Office:

1. Did anyone assist you in the preparation of your testimony? If so, please give the name or names.

2. Have you experienced any reprisals because of your statements or testimony in the NARS vs Turnage matter? If so, please describe them.

3. Did you write the two anonymous letters to Mr. Erspamer? If not, do you know who did?

4. What is your grade and step? How long have you held your grade?

5. Is it your belief that the only reason you did not receive an appointment with the Board of Veterans Appeals is because you refused to consider an appointment at the GS 12 level?

6. Were you fully aware that the Chairman of the Veterans Appeal Board had a long standing practice of not offering such appointments above the GS 12 level?

7. Did you fully inform the California judge on the issue of not receiving the Board of Veterans Appeals appointment?

8. In a conversation on January 7, 1987, with Dr. Moore did you tell him that you did not view as reprisal the decision of the Board of Veterans' Appeals not to accept your transfer at the salary you wanted, or words to that effect?

9. On January 7, 1987, you allegedly called the judge in the NARS case and complained about reprisal against you. Earlier that day you had been in a conversation with Dr. Moore. When you left his office, what did you tell him you were going to do or not going to do?

10. Was there anybody else present during the above referenced conversation with Dr. Moore?

11. Since your call to the court on January 7, 1987, have there been any actions by the VA or individuals at the VA, which you believe are for purposes of harassment or reprisal against you?

12. When Mr. Dunlop was your immediate supervisor at the Washington Regional Office, did you have problems or disagreements with him? If so, please describe them.

13. On January 7, 1987, you told the California judge that you had been "reprimanded" by Mr. Herb Mars. The word "reprimand" has a very specific meaning as it is used in the Federal Civil Service. As an attorney and long-time government employee you should be aware of that meaning. Were you in fact, "reprimanded" by Mr. Mars?

PUBLIC CITIZEN LITIGATION GROUP
SUITE 700
2000 P STREET N.W.
WASHINGTON, D.C. 20036

(202) 785-3704

May 1, 1987

By Hand

The Honorable G.V. Montgomery
Chairman
House Committee on Veterans' Affairs
335 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Montgomery:

Enclosed are the responses of my client, Mr. Ronald B. Abrams, to the questions propounded by Committee Member Mr. Solomon, to follow up on the hearing held before the Committee on March 17, 1987. Please let me know if there any questions on this matter.

Sincerely,

David C. Vladeck
Attorney for Ronald B. Abrams

Enclosure

RESPONSES OF RONALD B. ABRAMS
TO QUESTIONS PROPOUNDED BY
THE HONORABLE GERALD B. H. SOLOMON, OF
THE HOUSE COMMITTEE ON VETERANS' AFFAIRS

1. I was assisted in the preparation of my testimony by my attorney, David C. Vladeck, Esquire. In addition, my attorney, and several of his colleagues, helped prepare me to respond to questions by Members of the Committee.

2. As was made clear during my testimony before the Committee, I have been the subject of considerable harassment since my compelled involvement in the NARS litigation. Among other things, (a) I have been subjected to a punitive job transfer; (b) because of false, unfounded and irresponsible rumors that I was responsible for handing over confidential agency material to the plaintiffs' lawyer in NARS, I was denied a position at the Board of Veteran Appeals, and subjected to repeated verbal abuse by a number of supervisory staff; (c) I have been made a pariah at work -- I have been instructed not to talk with employees of the Veterans Administration outside my work unit, and it appears that many employees of the Compensation and Pension Service have been directed not to talk to me; (d) I have been subjected to the most virulent form of anti-semitism imaginable -- with several witness present, I was handed a swastika by a representative of a service organization. Veterans Administration official are well aware of this incident, but have taken no action whatsoever, thereby, in my view, condoning this blatant act of anti-semitism.

3. No; I have no knowledge of who wrote the letters.

4. I am a GS-13, a rank I have held for ten years.

5. No. I believe that I was denied a position at the Board of Veteran Appeals because of my participation in the NARS litigation, and because officials at the Board were informed that I was suspected of leaking agency documents to the plaintiffs' attorney in NARS.

6. The question incorrectly states that the Board had a "long standing practice of not offering such appointments above the GS 12 level." In fact, insofar as I am aware, there is no formal Board policy that forbids it to make such appointments at grades higher than GS 12. Moreover, the arrangement that had been discussed, and I believe agreed to, was that I would be detailed to the Board by the Compensation and Pension Service for several months at my present grade level. If, after that period, the Board was satisfied with my work, I would then be formally transferred as a GS 13, which I understand would be fully in keeping with Board policy. Indeed, when I first talked the Chairman of the Board of Veteran Appeals, Mr. Kenneth Eaton, I made it clear that I would not accept a position at a grade lower than GS 13, and, at that time, I was assured that my grade level would not be an insurmountable obstacle to my transfer.

7. Yes.

8. No. I told Dr. Moore that I could not prove that I had been denied the transfer to the Board of Veteran Appeals for improper reasons, although I was sure that that was the case.

9. I told Dr. Moore that I was considering calling Judge Patel, who is the presiding Judge in the NARS case. I also discussed the matter with Mr. Spindle and Mr. Mars.

10. I do not believe so.

11. Yes. There have been a number of incidents, including, for example: (a) the Veterans Administration's continued failure to take action against the person responsible for the anti-semitic act described in paragraph 2(d) above; (b) the continued attempts to isolate me and prevent me from talking with other agency personnel; and (c) the agency's continued failure to assign me to a meaningful and productive work environment.

12. This question incorrectly states that I was employed at the Washington Regional Office. That is not the case. Mr. Dunlop was my second-level supervisor when I worked in Field Operations for the Compensation and Pension Service. During that time, we had a continuing disagreement over policy relating to the protection of veterans' due process rights. Mr. Dunlop took the position that efficiency was more important than ensuring that the veterans' procedural protections were fully safeguarded. On one occasion, I drafted a memorandum to Dr. Moore, through Mr. Dunlop, advocating continued strict oversight of the field offices in their performance regarding due process matters. Mr. Dunlop objected to my memorandum, directed me not to present it to Dr. Moore, and destroyed the memorandum. He then told me that if I knew what was good for me, I would drop the matter.

13. With all due respect, this question seeks to elevate form over substance in a rather perverse way. During my discussions with Judge Patel, who is a respected, knowledgeable federal judge, and not a civil service employment officer, I used the term reprimand in the normal, generally understood sense of the word. I have no doubt that Judge Patel understood exactly what I meant -- that I had been harassed and subjected to opprobrium within the agency for participating the NARS litigation.

BARRY BOSKOVICH RESPONSES TO

Questions for NARS vs Turnage Hearing

March 17, 1987

from

Honorable Gerald Solomon

QUESTION NO. 1

It has not been too clear from your prior testimony whether you are or are not afraid of reprisal. Are you?

RESPONSE:

I am most definitely afraid of reprisals and other harassment based on my involvement in the NARS matter.

QUESTION NO. 2

Have you actually experienced any reprisals or harassment because of your testimony or any other action connected to this case?

RESPONSE:

It is my opinion I have been harassed ever since I became aware of the NARS eighth document request.

I was told by both Mr. Spindle and Mr. Rice, my supervisors, not to talk about the issues relating to NARS. Mr. Spindle said it was not our problem. I was "encouraged" by Mr. Zeglin of the General Counsel Staff and Ms. Cadieux of the Justice Department to soften my testimony in the NARS litigation. Ms. Cadieux told me that her supervisor would not accept some of my corrections to the deposition.

After I found two files, entitled "NARS" and "Due Process" which I thought should be reviewed for possible submission in the NARS litigation, I was yelled at by Erin Orr, one of Mr. Hickman's staff members. Mr. Spindle, my second level supervisor, told me I had been warned not to discuss NARS but I was now involved. He told me my career would only be salvageable if I avoided further involvement with the NARS discovery. I was told not to look for documents but if I found any I was to give them directly to him and he would decide whether to pass them on. I was told to refrain from eating lunch and taking coffee breaks with Mr. Abrams. I was told to make new friends. Mr. Spindle told me I should be concerned about my wife and family but he did not explain why. Mr. Spindle told me that Mr. Dunlap had recommended to Mr. Moore at a staff meeting that my involvement in NARS discovery should have a negative effect on my annual evaluation. Mr. Yurgel had told me that Mr. Spindle also told him about the discussions at the staff meeting.

In addition, Mr. Spindle told me how I should answer questions at the hearing in San Francisco. He also told me he knew I made several changes to my deposition, but would not tell me how he knew.

I was falsely accused by Mr. Dunlap of making erroneous comments about statements made by Mr. Foulds regarding Due Process in the St. Petersburg regional office without first obtaining verification from others. Mr. Spindle later acknowledged to Mr. Yurgel that I was set up.

I have been told that certain items of my work have been discussed with Mr. Dunlap, which is not normal procedure.

Since I gave my testimony before the House and Senate Committees on Veterans Affairs, Ms. Norrad, acting as Director of the Compensation and Pension Service, told my supervisor that if she saw anyone in my section talking with a staff member of Field Operations, she would not consider the discussion work related but instead personal. I understand, upon Mr. Moore's return, he eliminated Ms. Norrad's rule.

I am afraid this harassment will continue.

QUESTION NO. 3

In deposition testimony you said that it was your "impression" from talking with a Mr. Tomasek that document destruction occurred after Mr. Tomasek knew of the discovery request but that he did not directly tell you that. Mr. Kenny stated under oath during testimony that you told him Mr. Tomasek "admitted" that he had purged files after receiving the discovery request. Mr. Nicholson says under oath you told him the same thing. Please state your recollection of these events.

RESPONSE:

When giving my depositions I did not think I could prove that Mr. Tomasek directly told me that document destruction occurred after he knew of the discovery request. Since I was not to talk with anyone else about my testimony, I did not know if anyone else remembered those conversations. I know now that Mr. Nicholson also remembered at least one of those conversations.

In one discussion with Mr. Tomasek after he gave his deposition, Mr. Tomasek told me he identified Mr. Abrams, Mr. Kenny and me as persons he had talked to about purging the records. I told him I wished he hadn't said that because he knew that I had told him about the eighth document request while he was still removing material from the status files. Mr. Tomasek replied he had no choice. He was asked the question and had to answer it.

I do not recall if I ever told Mr. Kenny or Mr. Nicholson that Mr. Tomasek admitted to purging the files after he knew of the document request. I do know now that throughout Mr. Nicholson's sworn testimony, he identified Mr. Kenny as the person who talked to him about the document destruction. Mr. Nicholson also clearly stated in his sworn testimony, on page 2-371 of the court record, that he learned the details about Mr. Tomasek's purge of records from Mr. Tomasek himself.

QUESTION NO. 4

Is it true that in a sworn statement you said that Mr. Nicholson told you that when he testified in San Francisco, he indicated he believed records were destroyed after the discovery request was received by the VA?

RESPONSE:

I stated on page 4 of my Prepared Statement submitted in connection with the Joint Oversight Hearing on the NARS v. Turnage matter that Mr. Nicholson told me that, when he testified in San Francisco, he indicated that he too believed records were destroyed by the Field Operations Staff after the discovery request was received. This was an unsworn statement.

In that discussion with Mr. Nicholson during the week following the hearing in San Francisco, Mr. Nicholson discussed his feelings about the hearing with Mr. Abrams and me. Mr. Abrams and I asked Mr. Nicholson whether his statements quoted in the newspaper were correct. The San Jose Mercury News, December 6, 1986 stated, "Lawrence Nicholson, chief of quality review for the VA Compensation and Pensions Division, contradicted Tomasek's testimony." Nicholson testified that Tomasek admitted throwing out papers after he knew about the document request. The Los Angeles Times, December 5, 1986, stated: "At one point Thursday, the judge flatly asked Nicholson: 'Your opinion is yes documents were removed from the files after the [official] document request was received, is that correct?' Nicholson paused, then answered "Yes, it is.'" Mr. Nicholson then told Mr. Abrams and me that the statements were true.

QUESTION NO. 5

Who have you talked to regarding your testimony, and who, if anyone, has assisted you in preparing it?

RESPONSE:

After receiving an invitation to testify as a private citizen, I discussed this invitation with Mr. Abrams, Mr. Kenny and Mr. Yurgel. They told me they had also received invitations along with Mrs. Wheeler, Mr. Hickman and Mr. Dunlap. Mr. Abrams, Mr. Kenny and I agreed it was our duty to accept Chairman Montgomery's invitation. Mr. Yurgel told us he was not going to testify. I have had other conversations with Mr. Kenny and Mr. Abrams regarding my testimony.

I have been represented by Stephen H. Sachs and Gerard S. Citera of the law firm of Wilmer, Cutler & Pickering in connection with my testimony before the Joint Oversight Hearing. They assisted me in preparing for my appearance before the Committee and in drafting my Prepared Statement. Prior to the hearing, I also discussed the nature of my testimony with Marie McGlone of Congressman Edward's staff, and with Jane Wassman, a staff member of the Senate Committee on Veterans Affairs.

At the conclusion of my testimony, I answered questioning from members of the news media.

QUESTION NO. 6

In a deposition in the NARS case you made substantial changes to the transcript. Why did you do that? Did anyone tell you what to change?

RESPONSE:

After my first deposition, I was given the opportunity to correct the transcript of my deposition. Mr. Zeglin, the Deputy Assistant General Counsel of the VA, told me I could change anything as long as the statement remained true. Mr. Zeglin also told me to be absolutely certain I could prove everything I said. As a result, I revised some of my statements to soften points that I know to be true but could not independently corroborate. After I turned in my initial corrected transcript to Mr. Zeglin, he asked me why I changed "I know" to "I believe." I reminded him he had told me I could be sued if I could not prove my statements. Mr. Zeglin then told me "I believe" is the same as "I know."

A few days later, Mr. Zeglin asked me to come to his office to discuss my deposition. He and Ms. Cadieux of the Justice Department were waiting for me. They said my corrected transcript was still not acceptable. Together we went over my deposition, word by word, line by line. It took us several hours to cover approximately 20 pages. Ms. Cadieux told me she could not understand some of my statements. She said that she thought I answered the questions too quickly. Ms. Cadieux wrote statements on a legal tablet and asked me if I agreed. I tried to make my statements acceptable to her. After each statement, I would ask if she understood or if the statement was acceptable. If it was not, I restated my answer. Ms. Cadieux then asked me to reread my entire transcript and make corrections. I rewrote several more statements and listed reasons for the changes. I again returned the transcript. After several days Mr. Zeglin called me to his office to sign the transcript and have my signature notarized. While many statements were softened, the statements remained true. Because of the changes to the deposition, I was requested to give a second deposition.

QUESTION NO. 7

In your testimony you referred to a claim by a former Prisoner of War. Please check your records and give the committee his name and claim number.

RESPONSE:

Vincent J. Difrancesco, CSS 214 14 1832.

During a Staff Assistance Visit I made to the Washington Regional Office on March 18-22, 1985, I identified this case and brought it to the attention of station management, L. Wheeler, Adjudication Officer, Mr. Dunlap, Assistant Adjudication Officer, and W.D. Smith, Director. In this case, a former WWII prisoner of war filed a claim for compensation on January 14, 1984. The veteran was requested to furnish his own service records along with an income statement. Income is not an issue in a Compensation case. Even though a Prisoner of War Protocal Examination was not requested, the claim was administratively denied on May 23, 1984 for failure to submit requested evidence. Mr. Difrancesco was not given the right to appeal. An income statement was received on September 19, 1984 and the claim was disallowed again on December 5, 1984 for excess income. Service medical records had not been obtained at the time of the disallowances. Credit for this case had been taken twice. The visit report indicated that such a practice is in violation of the regulations, 38 CFR 3.103(e) and 3.158, VA manuals, M21-1, pars 4.02a, 7.01b and 16.03, M21-4 par 2.06b and DVB Circular 21-83-5 and must be discontinued. This example is discussed on page 9 and 10, and Attachment D of the Washington Regional Office Visit Report released April 16, 1985.

QUESTION NO. 8

Your testimony refers to a "death threat" received by Mr. Kenny. Mr. Kenny testified that the threat had no relationship to the NARS matter. Why did you make this statement?

RESPONSE:

In my prepared testimony before the House and Senate Committees on Veterans Affairs, I indicated that Mr. Spindle told me on October 31, 1986 that because of my involvment with the NARS discovery request, I should be concerned about my wife and family. Immediately after this discussion I returned to my office and told Mr. Kenny what had happened. I told Mr. Kenny that the threat was probably meant to be an economic reprisal. Mr. Kenny then reminded me of the death threat typed on government bond that he had received in January 1986. Mr. Kenny said that based on that experience, I should be concerned. Mr. Kenny did not know why he received this threat but we speculated that it might be related to a recent I.G. investigation of the Washington Regional Office. Mr. Abrams told me in San Francisco that Mr. Kenny had brought a copy of the death threat to give to the judge if asked, but was not asked. After returning from San Francisco, Mr. Kenny gave Mr. Abrams and me a copy of the death threat so we could include it with records to be submitted under NARS discovery.

Barry Boskovich
Barry Boskovich

Dated: April 29, 1987

Office of the
Administrator
of Veterans Affairs

Washington DC 20420

Veterans
Administration

MAY 8 1987

MAY 7 1987

Honorable G. V. (Sonny) Montgomery
Chairman, Committee on Veterans'
Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find the Agency's responses to the questions which you forwarded on behalf of the Honorable Gerald Solomon for the March 17, 1987, hearing by the House and Senate Veterans' Affairs Committees.

A copy of the responses has also been provided to Senator Alan Cranston, Chairman of the Senate Veterans' Affairs Committee and Senator Frank Murkowski, Ranking Minority Member. Thank you for the opportunity to provide this additional information for the record.

Sincerely,

THOMAS K. TURNAGE
Administrator

Enclosure

QUESTIONS FROM NARS V. TURNAGE HEARING
MARCH 17, 1987
FROM HONORABLE GERALD SOLOMON

Question 1:

It has been stated that among the documents withheld by the VA from discovery were "reports of massive due process violations and large scale breakdowns in the VA's quality control mechanism." How do you respond to this statement?

Answer: Our records concerning claims processing have been made available for discovery; they were not withheld. Included in the documents furnished were reports of Field Station Surveys, some of which discuss the failure of individual stations to comply fully with established due process procedures. Describing this as "massive violations" is an inappropriate exaggeration. We are constrained to note that, had there been "large scale breakdowns" in the quality control procedures, there would have been no identification of stations with quality problems.

Our system of quality control works, but we have never claimed perfection. We continually search for problems and take any action necessary to correct deficiencies.

Question 2:

Several references have been made to documents relating to the NARS case being shredded by the VA. As I understand it, a document shredder is a machine that grinds up or cuts up documents into thin spaghetti-like strips so that it's virtually impossible to reassemble them. Was this done at the VA? Were documents shredded?

Answer: The VA has shredding machines, but the Compensation and Pension Service did not shred or arrange for the shredding of any documents allegedly relating to the NARS v. Turnage litigation.

Question 3:

I understand that the plaintiff has not responded to some of VA's discovery requests? Is this so; what discovery has the VA engaged in during this litigation, and what has been the response from the plaintiffs?

Answer: Thus far we have served on the plaintiffs four sets of interrogatories and five requests for production of documents. The fourth set of interrogatories and fifth document request were served on April 9, and the responses to those are due on May 12. Plaintiffs did respond to the other discovery requests; however, the adequacy of their responses has been a source of much concern to us. In respect to the second and third sets of interrogatories, as well as the second, third and fourth document requests, we filed with the court, in December 1986, a motion to compel answers to some of the discovery requested. That motion, which was argued at a hearing before the Magistrate in January, was ultimately granted in part and denied in part.

We and the plaintiffs have disagreed over various matters relating to discovery. Under the district court's rules (i.e., Rule 230-4, U.S.D.C. N.D. Calif.) litigants are required to "meet and confer" regarding such disagreements. Hence, we and the plaintiffs have been engaged in that process.

Question 4:

Please respond to the assertion that those documents produced voluntarily by the VA have been innocuous and those withheld volatile.

Answer: "Innocuousness" and "volatility" are in the eyes of the beholder, but any suggestion that VA withheld documents on the basis of their controversialism is simply fallacious.

Question 5:

The entire VA claims-adjudication system would appear to be on trial. Is this case unusual by reason of the scope of the issues?

Answer: The issue at the core of the litigation, i.e. the constitutionality of the fee limit as it applies to atomic veterans' claims, is not of itself unusually broad. What makes the case difficult to manage is that in attempting to prove their case, plaintiffs seem bent on trying to show that the claims adjudication system at large is fundamentally flawed. This is unprecedented for VA

QUESTIONS FROM NARS V. TURNAGE HEARING
MARCH 17, 1987
FROM HONORABLE GERALD SOLOMON

Question 1

How was your statistical quality control system developed? In your opinion, does it give you correct information as to the adjudication of claims at your 58 regional offices?

Answer: The VA first instituted work measurement in 1947. In 1953, quality standards were developed based on the quality of the end products selected as quantitative reportable work units.

This was a completely manual system, designed to measure functions and activities -- not individuals. Quality information was manually accumulated and reported. Detailed operating performance information was provided to first line supervisors, with summarized information going to higher levels of management.

During FY 1984, the Adjudication Quality Control Criteria and Standards were updated. These are the criteria and standards used to measure substantive, judgmental, and procedural defects in Adjudication Divisions.

It is our opinion that the system gives us good information as to the quality of claims adjudication. This, in conjunction with the station surveys and special visits, allows us to ascertain how well a regional office is functioning.

The C&P SQC (statistical quality control) system selects a random sample of cases processed at each station. Generally, each station is reviewed every 6 months. Additionally, with these semi-annual reviews, a sampling of cases initially reviewed under station SQC procedures is selected for review by CO. Over 17,000 cases are reviewed by CO SQC annually.

The results of the CO SQC review of each station are analyzed by the Field Operations Staff to determine (1) if the quality levels found are within acceptable limits and (2) whether the levels compare favorably with the quality levels reported by the stations on their local review. If not, it is determined what actions will be necessary to improve the station's quality and/or the station's quality review.

Additionally, C&P Service issues a quarterly letter noting any general national trends or deficiencies found during CO SQC review. The letter points out areas where training should be concentrated to improve the quality of the adjudication of claims.

Question 2

Please respond to the statement that, "In general, the documents (released in the NARS litigation) reveal that, to show greater productivity (and ensure meeting productivity standards), VA adjudicators manipulate cases to increase the number of end product codes entered."

Answer: Documents released in the NARS litigation do not establish a general pattern of adjudicators manipulating claims in order to inflate productivity or meet performance standards.

Each claims examiner generally completes over 2,000 final claims actions each year. The number of actions it would take to make a difference in the evaluation of an employee's annual production is so large that any concerted effort by an individual or group of employees to "manipulate" completed actions would become blatantly obvious.

Most of the "claims churning" allegations concern an administrative procedure called the "record purpose disallowance." Record purpose disallowances are used when claims appear to have been abandoned. For example, if a claimant does not respond to a request for information, and no further action can be taken on a claim until the evidence deemed necessary for a decision is received, an adjudicator can take a record purpose disallowance, i.e., can clear the control from the computer system's list of claims pending final action.

An administrative disallowance does not affect a claimant's right to pursue benefits; it does not reduce the amount of benefits payable. To ensure that claimants have every opportunity to pursue their claims, our current procedures require that the individual be notified when this action is taken and again informed of the evidence needed to consider their claim.

The improper denial of a claim, for any reason, has never been encouraged or condoned. The claims processing system is designed to allow for the control and review of the millions of claims for benefits received every year. We believe that the documents we have produced during discovery show that we expend significant resources in the identification, correction and prevention of mistakes concerning claims processing.

Question 3

Please respond to the statement that "the actual error rates (at Regional Offices) were found to be two or three times higher than those reported by the Regional Office supervisors." Furthermore, the Central Office validation system is criticized as being "unreliable and ineffective," by some documents disclosed in the NARS litigation.

Answer: In 1982, the VA Inspector General issued a report citing error rates much higher than reported by the regional offices. We did not agree with the report's conclusions because of the way the study was constructed and the IG's interpretation of the numbers derived. Methodology aside, we note that IG found that our errors were most likely to be in the claimant's favor.

The Central Office Validation system is based on accepted statistical principles. It provides for a review of a random sample of claims processed by the regional offices, and the comparison of the error rate during the CO review. The results of the review are then reported to Central Office, regional office and division management. If the stations' reported error rates do not meet established guidelines, or if their error rates are not in line with the results of the CO review, the stations are required to take specific remedial actions.

Question 4

It has been claimed that among the documents withheld by the VA from discovery were "reports of massive due process violations and large scale breakdowns in the VA's quality control mechanism." Is this true?

Answer: No. Our records concerning claims processing have been made available for discovery; they were not withheld. Included in the documents furnished were reports of field station surveys, some of which discuss the failure of individual stations to comply fully with established due process procedures. Describing this as "massive violations" is an inappropriate exaggeration. We are constrained to note that, had there been "large scale breakdowns" in the quality control procedures, there would have been no identification of stations with quality problems.

Our system of quality control works, but we have never claimed perfection. We continually search for problems and take any action necessary to correct deficiencies.

Question 5

How is work routed and approved in Compensation and Pension Service? Can all employees just send anything to the Director of the Service they want to?

Answer: Work is assigned within the C&P Service "through channels." Generally, the Director's office will assign work to one of three assistant directorates, depending on the nature of the work. The Assistant Director then assigns it to a Chief of a section, and the Chief will assign it to an employee within the section. While in rare cases the actual work assignment will be handled by a supervisory employee, it is normally completed by staff employees. Work products completed within the Service are reviewed in reverse order. To the extent that signature authority is delegated, a lower level supervisor may exercise delegated authority to clear finally certain types of work products.

Whereas work products generally flow through prescribed channels, other communications are less structured. The Director of the Service maintains an open door policy and will discuss employees' concerns directly with them. He also will accept correspondence from them directly. He does encourage employees to go through supervisory channels when they have or perceive problems; however, he does not limit their direct access to his office.

Question 6

Has Mr. Abrams or anyone else made a claim of reprisal or harassment to any office, or agency, or department of the executive branch in regard to the NARS vs Turnage matter?

Answer: Mr. Abrams has repeatedly charged harassment and complained of reprimands, and has communicated his concerns in writing to the Director, Compensation and Pension Service. We are not aware of complaints by Mr. Abrams or anyone else to other offices, agencies or departments of the Executive branch involving official claims of either reprisal or harassment. The Department of Justice is investigating Mr. Abrams' charges because of his complaints to the Court.

Question 7

Is it true that the Compensation and Pension Service is completely overwhelmed and tied up answering discovery requests?

Answer: The Compensation and Pension Service is not presently overwhelmed by plaintiffs' discovery requests. Compliance with prior discovery requests (primarily the Eleventh) has virtually stripped the C&P Service of its files, including employees' personal files.

To comply with the plaintiffs' Eleventh Document Request, the normal operations of the Service had to be suspended. The request was so broad that approximately 300 cubic feet of documents were produced between mid-February and early March 1987. The unavailability of these files has hampered the operations and effectiveness of the C&P Service severely. They are unable to provide adequate comments on proposed legislation; timely replies to correspondence and other types of inquiries; proper procedural instructions to field stations; and efficient service to veterans and their dependents. The Field Operations Staff, which monitors operations at the 58 regional offices, has experienced a serious decline in its ability to assess the overall operations and future staffing needs of the field stations.

To date, only 8 boxes of the files supplied by the C&P Service have been returned. Each box is approximately 1 cubic foot. Seven of these boxes contained only copies of obsolete forms; the total contents of the 8 boxes was of minimal value to the Service. We do not know when the remaining records might be returned.

The C&P Service has 2 full-time staff consultants handling document requests, correspondence, and other matters concerned with the NARS litigation. Their work requires a good deal of clerical assistance; other employees become involved as necessary.

[INSERT]

ADDITIONAL QUESTIONS SUBMITTED BY SENATOR ALAN CRANSTON

Senator CRANSTON. Do you believe that special procedures need to be instituted by the V.A. in processing complex claims in order to ensure accurate and equitable treatment of such claims?

What procedures can you recommend?

Mr. ERSPAMER. I believe a number of measures could be taken, in addition to eliminating the fee limitation and permitting judicial review, both of which are discussed in my prepared statement. My suggestions include both general measures, and particular measures concerning the adjudication of ionizing radiation claims. First, the quality of V.A. adjudicators needs to be improved. Budgetary problems and policy determinations have resulted in a lowering of standards and a deterioration in the quality of V.A. adjudicators. Formerly, only attorneys were hired for rating boards. This is no longer the case. The V.A. has come to rely too heavily on GS-5 and GS-7 level personnel.

Second, local adjudicators must be required to account for and accept responsibility for the quality of adjudicative decisions. A validation mechanism must be instituted to patrol and check quality control reports at regional offices. At the present time, no validation process exists respecting quality control statistics generated by regional offices.

Third, a series of special procedures must be set up to handle ionizing radiation claims and other complex claims which do not fall into the traditional model. This includes providing for additional development by the V.A., furnishing more assistance to veterans, including perhaps legal assistance, an end to V.A. reliance on DNA dose estimates and the assignment of dose reconstructions to an independent entity not affiliated with the nuclear testing program, and the articulation of a radiation dose standards tied to particular radiogenic diseases, reflecting the importance of the different half-lives of various fission products. Alternatively, Congress should set up a separate compensation program for victims of the atomic testing program specifically listing compensable diseases.

Fourth, the V.A. needs to devote more personnel to the auditing function and devote more financial resources to improve their computer systems. As it stands, site visits by auditors to regional offices have been severely curtailed due to budgetary constraints. Statutes and regulations are meaningless unless employees follow them. It would also be advisable to assign the auditing function to an independent entity.

Fifth, the V.A. should assign responsibility for each claim to a particular adjudicator. In this way, the veteran would not have to face a nameless, faceless bureaucracy, and would have someone to contact should the need arise.

These are just a few of the suggestions I would propose for improving the V.A. adjudication system.

Senator CRANSTON. I would like to examine more specifically some of the irregularities within the V.A. claims adjudication system which you have identified.

You stated that the V.A. frequently permits "extraordinarily" high error rates in claims processing, often higher than its own set standards. What is responsible for this, in your opinion, and what can be done to ensure compliance with appropriate, minimal error rates?

Mr. ERSPAMER. The root of the underreporting problem is that managers in regional offices generally receive promotions and merit pay increases based upon their reporting of error rates within tolerated ranges. Therefore, they have an incentive to underreport errors. Moreover, there is no validation process by which error rates reported by local managers are systematically checked, and no action has been taken against managers who underreport errors. Finally, many managers misclassify serious, substantive errors into trivial categories. This means that reported V.A. error rates have no integrity. See Exhibit D.

To ameliorate these problems, the V.A. should: (1) institute a system to double-check regional office quality review statistics; (2) evaluate managers based upon criteria other than production and their own unvalidated reported quality levels; and (3) insure that clear standards exist for classifying errors and that local managers follow them. In addition, the measures outlined in my previous answer would be of substantial benefit in improving the situation.

Vietnam Veterans of America, Inc.
2001 S St., NW
Suite 700
Washington, DC 20009-1125

(202) 332-2700

March 16, 1987

STATEMENT OF VIETNAM VETERANS OF AMERICA ON THE NARS CASE AND VA DOCUMENT DESTRUCTION

Vietnam Veterans of America is angered by the VA's apparent disregard of lawful procedures in the NARS case, but we are not surprised by it. The bitter experiences of our membership throughout the country has shown us that the VA system is rife with bureaucratic breakdown and institutional inequity.

While destruction of documents and obstruction of justice--the focus of these hearings--are cause for serious concern, the reality being hidden by these improprieties is cause for outrage. We believe the picture emerging from the NARS case will clearly demonstrate that there are many deeper and more troubling questions to be answered.

What documents were destroyed or withheld? What information was the VA attempting to conceal? What is the implication of these documents for veterans who are pursuing disability benefits? How widespread is the denial of due process for veterans who are pressing claims? Who among the VA hierarchy was aware of the systemic problems in the agency's compensation service? What action, if any, was taken by management to address these issues? Our nation's veterans and taxpayers deserve full answers to these and other serious questions.

-over-

Information available at this point indicates that gross inadequacies clearly exist in the VA benefits system, and that the entire management system needs to be overhauled. While some of the problems run deep within the system and may take years to correct, there are many things that can be done immediately. One simple and logical place to start is to subject the VA to the normal judicial oversight applied to every other government agency. The VA is alone among bureaucracies in that it is not accountable for its actions because veterans are not permitted to take the VA to court. Establishing a system to allow for judicial review of VA decisions, such as called for by H.R. 639 and S. 11, would be an important first step in improving services to veterans and reforming the nation's worst bureaucracy.

Vietnam Veterans of America is very pleased that the Committee on Veteran Affairs is holding a hearing on this vital issue, and we would like to commend Representative Don Edwards of California for requesting this hearing and Representative Sonny Montgomery of Mississippi, Chairman of the House Committee on Veterans Affairs, for agreeing to the proposal.

ALAN CRANSTON, CALIFORNIA, CHAIRMAN
SPARK M. MATSUNAGA, HAWAII
DENNIS DECONCINI, ARIZONA
GEORGE J. MITCHELL, MAINE
JOHN D. ROCKEFELLER IV, WEST VIRGINIA
BOB GRAHAM, FLORIDA
FRANK H. MURKOWSKI, ALASKA
ALAN K. SIMPSON, WYOMING
STROM THURMOND, SOUTH CAROLINA
ROBERT T. STAFFORD, VERMONT
ARLEN SPECTER, PENNSYLVANIA
JONATHAN R. STEINBERG, CHIEF COUNSEL/STAFF DIRECTOR
ANTHONY J. PRINCIPI, MINORITY CHIEF COUNSEL/STAFF DIRECTOR

United States Senate
COMMITTEE ON VETERANS' AFFAIRS
WASHINGTON, DC 20510-6375

Personal and Confidential

July 15, 1987

Ronald Abrams, Esq. (202B)
Veterans' Administration
Room 466
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Dear Mr. Abrams:

I have enclosed the following questions relating to the March 17, 1987, joint Congressional oversight hearing of the Senate and House Committees on Veterans' Affairs which considered the imposition of a fine on the Veterans' Administration for its failure to comply with civil discovery requests in the case of NARS v. Turnage, and ancillary issues related to the VA's claims adjudication system. I apologize for the delay in forwarding these questions.

Please respond to the questions to the best of your ability, and in accordance with any limitations, instructions, or conditions which you may still be subject to as a result of any court order imposed upon you in the NARS v. Turnage litigation, or any other official proceedings or matters related to the litigation.

Thank you for your cooperation and assistance in the hearing, and I look forward to your responses as soon as possible so your responses may be included in the hearing record.

Sincerely,

Frank H. Murkowski

Frank H. Murkowski
Ranking Minority Member

Enclosure

Questions Submitted by
Senator Frank H. Murkowski
Following the Joint Hearing on
NARS v. Turnage
March 17, 1987

1. At the time of the hearing you indicated to the Committees that you represented the National Association of Radiation Survivors in the *NARS v. Turnage* litigation. Do you still represent NARS in the litigation, and are you still the organization's spokesperson for purposes of this hearing at this time? If not, please explain the circumstances surrounding the change in your status, to the extent it does not breach any attorney-client privilege. Please designate for each of your responses to the following questions, the capacity in which you are responding.

2. To the best of your knowledge, (1) was any of the cost of the newspaper advertisement which appeared in *The Washington Post* on March 17, 1987, concerning NARS, paid from the funds Judge Patel or the magistrate ordered the Veterans' Administration to pay to the plaintiffs as a result of the sanctions imposed against the VA in the *NARS v. Turnage* litigation; and (2) has NARS placed any additional advertisements in any media outlet-since that date, as the advertisement indicated?

3. In your live testimony before the Committees you indicated that you or NARS was conducting a study in the *NARS v. Turnage* case of the claim files, to develop a composite or a description of how an average VA claim file is approached by a veteran service officer, and the extent of assistance of the service representative. Please indicate (1) the status and the scope of the study; (2) who is conducting the study; (3) the methodology of the study; and (4) any findings or conclusions made thus far. Please provide me a copy of the study when it is completed.

4. In response to additional questions from Senator Cranston, you stated that the VA does not have a validation process for quality control statistics generated by the regional offices and error rates reported by regional offices, and consequently, this provides an incentive for local managers to underreport error rates. Do you consider the periodic reviews, including site survey reviews, conducted by the Department of Veterans Benefits Field Operations and Quality Review Offices to be part of a validation system by the VA's Central Office to check on the reporting of error rates by regional offices? If not, please indicate what, if any, significance the reports of these offices on error rates and quality review would be.

7. Do you have any first-hand knowledge of the June, 1986, destruction of Compensation and Pension Service field operations file materials? If so, please summarize briefly the extent of your personal knowledge.

8. Did you, or did you not, indicate to your supervisors, shortly before you called Judge Patel on January 7, 1987, that you would not call the judge with allegations of harassment? If you did indicate this, please (1) explain the circumstances; (2) state the reasons why you changed your mind; and (3) indicate with whom you discussed this.

9. Did you consult with any individuals or organizations, other than the staff of the Veterans' Affairs Committees, in preparation for this hearing?

   o If so, who are these individuals or organizations?

   o If so, did you seek their advice or information, or was it volunteered to you?

10. If you have not already provided the Committees with your memorandum entitled "Documentation of Due Process, NARS versus Walters, Suggested Action" for inclusion for the record, please attach it to your responses.

11. You have described at various times during the proceedings of the NARS case, and in your research conducted for the Department of Veterans' Benefits(DVB), that there are three levels of error codes recognized by DVB in the review of the claims adjudication process. You have identified the lowest error level as procedural errors, followed by judgement errors, and substantive errors, in an ascending order of seriousness.

    o Please summarize briefly your understanding of these three levels of errors and their respective direct and indirect impact on veterans' claims.

    o Please describe any differences you are aware of regarding how each of these levels of errors are brought to the attention of DVB management, and any differences which you are aware of which may differentiate the priority, thoroughness, and timeliness of the resolution or follow-up of an error depending on the assigned error classification. If you feel that there is a significant difference in the resolution of the levels of errors, what direct short and long-term impact would a misclassification of an error have on a veteran's claim during the pendency of the claim and on the final grant of benefits if the claim is ultimately granted, or alternatively, denied?

- What, if any, impact would the under reporting of "end product" codes by a regional office have on the pendency, or ultimate grant or denial, of a veteran's claim? Please direct your response to the impact on the veteran claimant, rather than the issue of employee productivity.

- Do your know the quantity or percentage of actual or reported errors of each error classification that actually benefited veterans?

12. You apparently disagree with the statement made by the Chief Benefits Director at the hearing in which it was stated that the substantive error rate was one and one-half to two percent. You apparently feel that the error rate is considerably higher, but precise measurement of the rate is difficult or impossible due to your belief that the invalidation rate is so high.

    - To the best of your knowledge, what do think the substantive error rate is? Please include the basis for, and any assumptions or limitations you make in your response. Also, indicate whether your response reflects a national or regional error rate and whether it is based on sampling methods. Please also indicate your assumptions relating to administrative disallowances and the use of the end product control system.

13. Do you have any data or statistics which would show how many actual claims for benefits were adversely affected (in a material right or in the payment of benefits), as the result of missing documentation of notice letters in claimant's files, in which it was impossible to verify whether the letter was actually sent to the claimant?

14. You have claimed that DVB lacks a validation standard to monitor errors reported by regional offices and you have characterized this as a crucial missing element in the claims adjudication process.

    o To the best of your knowledge, please summarize briefly, all existing Central Office and specific regional office procedures which validate or monitor error rates in the regional offices. Please include in your response: (1) any validation and enforcement procedures conducted by the Central Office quality review staff and survey teams; (2) the scope of the validation procedures they utilize; (3) and the scope of the review process of the findings and recommendations by DVB managers.

    o Do you consider the periodic reviews, including site surveys, conducted by the Compensation and Pension Service to be part of a validation system by the VA Central Office to check on the reporting of error rates by regional offices? Please explain.

    o Taking into consideration administrative feasibility, do you believe that a one-hundred percent validation system is necessary, or would one which is conducted on a sample basis ensure reasonable safeguards?

15. Much has been said during the hearing concerning "quality" versus "quantity" in the VA's claims adjudication system, and how these concepts may affect due process considerations.

    o Since timely processing of claims is also a significant factor in an effective claims adjudication process, how would you propose the VA claims adjudication process should be operated to provide an effective balance between quality and quantity considerations?

16. To the best of your knowledge, what factors--other than productivity--are considered in promotion, bonus, and pay increase evaluations of adjudicators and regional office managers? What weight is given to each factor, including productivity?

- Is there a documented factual basis for claims that adjudicators' performance for pay and promotion is measured largely by the number of "end products" taken?

- Can you cite performance standards, or promotion or award criteria, for individual adjudicators, unit or section chiefs, or adjudication officers, which are based on the number of end products taken as reported in the AMIS system?

- Can you supply documentation of specific instances where VA managers or adjudicators personally benefited because of "inflated" end product counts as a result of improperly terminating claims?

- Conversely, can you cite instances of VA managers or adjudicators being penalized (or not promoted) because of low end product counts reported by the end product measurement system?

Ronald B. Abrams, Esq
Veterans Administration
Room 468
810 Vermont Avenue, N. W.
Washington, D. C. 20420

SEP 2 1987

Honorable Frank H. Murkowski
Senate Committee on Veteran's Affairs
Room 202 Hart Senate Office Building
Washington, D. C. 20510

Dear Senator Murkowski:

I herewith enclose my answers to the questions attached to your letter of July 15,1987. Please contact me at the Veterans Administration Central Office if you wish to discuss this matter further.

Sincerely,

Ronald B. Abrams
RONALD B. ABRAMS Esq.

Enclosure

RESPONSE OF RONALD B. ABRAMS VETERANS ADMINISTRATION, TO QUESTIONS SUBMITTED BY SENATOR FRANK H. MURKOWSKI FOLLOWING THE JOINT CONGRESSIONAL OVERSIGHT HEARING BEFORE THE SENATE AND HOUSE COMMITTEE ON VETERANS' AFFAIRS CONCERNING NARS V. TURNAGE

Question 1

Response: Yes.

Question 2

Response: No.

Question 3 and 4

Response: The fact that I have been the subject of unjust and adverse treatment because of my forced involvement in the NARS case cannot be disputed. I have complained verbally and by memorandum to appropriate officials within the VA. My telephone call to Judge Patel is a matter of public record. Because I cannot differentiate between the actions taken against me because of my testimony in Court or my testimony before Congress, the following response answers both the third and fourth questions.

Prior to the realization by the managers of the Compensation and Pension Service that the NARS case would have considerable impact, all my work, especially my work on due process, had received uniformly high praise. The Director of the C&P Service called me his "due process expert". Another supervisor stated that " my work on due process brought new interest and concern to a subject which is overlooked in todays world of production only". I prepared a due process white paper that was so favorably received that copies were given to every Adjudication Officer for "enlightenment and guidance".

I thought that the work I was doing was exactly what the Compensation and Pension Service wanted me to do. To support this contention I submit a series of comments from various supervisors, praising my work in general and my advocacy of due process rights for veterans in particular.

The atmosphere in the Compensation and Pension Service radically changed after I was named in a NARS discovery request. A series of supervisors told me that I was suspected of giving assistance to the plaintiffs. I was informed that another supervisor told my co-workers and my immediate supervisor that she had no doubt that I was the author of the unsigned, "deep throat" letter to the plaintiffs' lawyer. My job function was changed in an adverse fashion. I was ordered not to talk to anyone outside my immediate work section. I was handed, in front of witnesses, a swastica inside a Jewish Star from a former VA employee. As far as I know the Compensation and Pension Service has not taken any action in response to this abhorent incident. In fact when I objected to this person's repeated presence near my work area, I was told by the Director of the Compensation and Pension Service that I was making too much of this matter.

When I first discussed the NARS case with representatives of the General Counsel and the Justice Department I explained that I was concerned that my evidence and testimony may damage the VA's case.

Please understand my predicament. I knew I had evidence that was damaging to my agencies' position in a major law suit. I realized as an attorney, that I was obligated to submit responsive evidence to discovery requests and to testify truthfully in court. At the same time the management of the Compensation and Pension Service, representitives of the General Counsel and representatives of the Justice Department refused to take any action to protect me from harassment that had already begun. I was so concerned about the lack of protection that I tried to insert in my first deposition an explanation of my request for protection from the lawyers representing the government.

After the harassment first began I tried to discuss my predicament with the Director of the Compensation and Pension Service. The Director stated that nothing could really bother him because he had already been the subject of an investigation by the FBI and the Inspector General. He said that he had been investigated as a result of an anonymous letter. The Director gave me the distinct impression that he considered another consultant to be the author of the unsigned letter. However the harrassment and the attacks against me continued.

I respectfully suggest you request copies of the transcript of my telephone call to Judge Patel, and copies of my memorandums dated February 6, 1987, May 5, 1987, March 30, 1987 and July 29 1986. These memorandums and the transcript of my telephone call to Judge Patel will support my contentions.

Question 5

Response: I believe there are several employees who have relevant information. However, I have been told that these employees are reluctant to accept a Congressional invitation to testify because they fear that what happended to me would happen to them. For example, one previously invited employee was told by a high official in the Compensation and Pension Service that it would not be in the employees best interest to testify before the Committees.

The high official, I was told, claimed he was speaking to the employee as a "friend". Another DVB official told the same employee "good boy", when he did not testify.

I do not know who was previously invited. Therefore, I suggest you invite: T. H. Spindle Jr., Gerald P. Moore. J. Gary Hickman, Lawrence V. Nicholson, Robert Yurgal, Bob Foulds, and Jack Frost. However, I believe that these people will not testify without being subpoenaed.

Question 6

Response: My testimony in Court in San Francisco revealed that the Compensation and Pension Service failed to produce relevant responsive evidence requested during discovery by the Plaintifs in the NARS case. I also know that a series of Plaintif's discovery requests were not given to VA employees who could have (and later proved to have) relevant information. (These discovery requests were given to all Compensation and Pension Service employees after the hearing in San Francisco.) I know that consultants who tried to be responsive to the discovery requests were harassed and chastised by employees of the Compensation and Pension Service involved in the production of evidence requested in the NARS case. I also know that enforcement of procedures designed to protect the fairness of the adjudication process were deliberatly deemphasized by the Assistant Director for Field Operations.

Question 7

Response: A consultant in the field operations section told me that he threw away documents pertaining to several regional offices, including a negative letter about the Adjudication Officer in the San Francisco regional office.

Question 8

Response: No.

Question 9

Response: I sought the advice of family and friends. I consulted with my attorney. I was also briefed by people brought to me by my attorney, but this briefing was generally not aimed to prepare me for this hearing.

Question 10

Response: I herewith attach the requested document.

QUESTION 11

Part 1

Response: The white paper I prepared entitled _Compensation and Pension Regional Office Quality As Measured By Central Office Quality Review_ gives the best answer to the first part of this question. I also suggest you read Appendix D of VA manual M21-4, paragraph 4.05b of VA Manual M21-1 and paragraph 3.23a of VA manual M21-4.

Part 2

Response: Paragraph 3.23a of VA Manual M21-4, directs regional offices to take any action necessitated by exceptions cited by Central Office. It has been my experience that most regional offices do not pay much attention to procedural errors because procedural errors by definition do not have an actual or potential effect on entitlement rights. By contrast, VA regional offices are obligated under par. 3.23a of M21-4 to correct substantive errors identified by Central Office. For example, if it can not be determined that due process notification was provided and Central Office assigned a substantive error, the regional office would be obligated to send a notification letter to the veteran and place a copy of that letter in the claims folder. If a procedural error was called, the regional office would not be obliged to send a notification letter. Therefore no one could be sure whether the veteran received procedural and appellate rights. The current policy of the Compensation and Pension Service is, I believe, to assign a procedural error. The ultimate decision for Compensation and Pension benefit purposes, is made by the Board of Veterans Appeals. Without due process notification, the ultimate decision can not be made.

Part 3

Response: This question is answered by the section in the white paper on regional office quality entitled, "Adjudication Management Responsibility". In addition claims not put under control may never be adjudicated. Under reporting of end products results in less efficient and untimely service to veterans.

Part 4

Response: In the white paper I helped prepare, that analyzed regional office quality I found that aproximately 86 percent of the substantive and judgemental errors found on Central Office quality review were errors against the veteran.

QUESTION 12

Response: Based on the statistics reported in the white paper entitled Compensation and Pension Regional Office Quality As Measured By Central Office Quality Review, the combined substantive error rate for both rating and authorization quality review was 8.4 percent. This figure is much higher than the combined error rate of 2.5 percent reported by the regional offices.

QUESTION 13

Response: Failure to provide due process notification is failure to provide a material right. Essentially, there are two ways that our regional offices can notify a claimant of a decision involving a claim for compensation or pension benefits. The regional office can create and mail a letter directly from the regional office or a computer letter can be sent from a facility outside the regional office. In either case the regional office cannot document that adequate due process notice was provided unless a copy of the letter is available for review.

According to the procedures governing VA claims adjudication, notification letters created by an adjudicator and mailed directly from the regional office must be reviewed by a senior adjudicator before work credit can be taken. In addition, copies of notification letters mailed from a facility outside the regional office should be placed in the claimns folder within several days.

Our regional offices do not have a way to show that a notification letter was sent, to whom the letter was adressed and what the letter said unless a copy of the letter is available. Various consultants in the Compensation and Pension Service have discovered numerous instances where a copy of a notification letter could not be obtained even several months after final action was taken on a claim for benefits. In addition, based on my survey trip experience and my central office quality review background, I can state that there is a widespread pattern of seriously inadequate notification letters.

The white papers mentioned earlier note that the bulk of the errors identified on Central Office quality review cite failures by regional offices to adjudicate claims fairly. Every veteran who does not have a copy of a notification letter in his or her claims folder has suffered a material loss. The VA is supposed to be on the side of the veteran. There is no way we can check to see what the veteran was told if a copy of the letter is not available. The basic VA adjudication manual reflects this in paragraph 4.05b of M21-1, which states, "Documentation that procedural due process was provided is a necessary and material function of the adjudication system".

At a recent adjudication officer's confrence, in a speech dealing with due process, the adjudication officer from the Seattle regional office talked about notification to claimants. (The VA calls its computer notification system "Target".) The adjudication officer stated, "Since Target we have not had a good way to provide notification. No flexibility has been permitted in Target to modify systems generated notifications. Although there has been some improvement, Target generated notices are often inadequate in content. CTU's can produce neither the timeliness nor volume required. This has lead to the proliferation of make do devices in the field, including hand written notes, stock paragraphs, pattern letters, etc. However often those on production and time constraints do not take the time to provide adequate notification."

QUESTION 14

PART 1

Response: Paragraph 3.20 of VA manual M21-4 answers your question. Also I suggest you contact the field operations section of the Compensation and Pension Service.

PART 2

Response: Site surveys if done properlly, can help confirm or refute Central Office and Regional Office findings.

PART 3

Response: We have no choice. It is not, in my opinion, possible to conduct a 100 percent validation under our present quality review system.

QUESTION 15

Response: Timely processing is a result of and not an opposing factor to quality adjudication of compensation and pension claims. The white paper dealing with the application of procedural due process to the Compensation and Pension program answers this question at great length. In addition, please read the white paper entitled Compensation and Pension Regional Office Quality As Measured By Central Office Quality Review.

If the Compensation and Pension Service enforced its own procedures the regional office adjudication divisions would do a better job resolving claims (quality). Adjudication of claims would be completed in a more timely fashion (timeliness). In addition more work would be done (quantity). However the real statistics would shock the Committees. The statistics you receive from the Compensation and Pension Service regarding how well we do our work, how much work we do and how fast we process claims are not, in my opinion, accurate. I believe that many Central Office consultants and regional office managers know this. In fact one supervisor in Compensation and Pension Service stated that there was gross abuse of our work measurement system.

A former VA regional office employee, in a letter to the Administrator stated, "The VA work measurement system should be thrown out. This too is a highly exaggerated and false appraisal of productivity and effectiveness. Cases in adjudication are manipulated to show end products of various sorts. More attention appears to be given to statistics rather than real issue - the claim itself. The present staff cannot do the work because productivity and effectiveness appears to be the issue and comparison is made with similar offices."

An adjudication officer in a memorandum to his supervisor stressed the importance of timely action on claims. He said, "It is imperative that all employees understand that the average timeliness of our claims processing is a direct measure of the service we provide. Proper initial action on claims and subsequent reviews are essential to ensure that we are providing the best possible service to our claimants."

A manger in the Pittsburgh Regional Office complained to Central Office about the difficulty his office had in meeting timeliness standards. He said, "Due to the continued reduction of personnel yet stronger emphasis on increased productivity it has become quite difficult to consistently meet timeliness standards in all areas. In fact, some of the standards have become almost impossible to attain."

The manager of the Newark Regional Office was so concerned about his own performance appraisal in an environment that emphasized production of end products that he expressed his fears to Central Office. He said, "As staff reduction occur, our management/supervisory personnel are increasingly responsible for the production of end products in a more stressful and managerialy taxing environment. There is a need for continued formal training in management's rights and responsibilities particularly as they relate to Performance Appraisal (430,432) and Discipline/Adverse Action (752)."

The Director of the New Orleans regional office offered the best analysis of the adjudication work measurment system. He said, "VACO statistical summaries provide comparative data and regional/national averages on timeliness and productivity of operations. No counterpart comparative data are provided for quality of operations. We have found this situation creates pressures for taking risks with quality in order to stay in line with or better national averages on timeliness and productivity. An effective work measurement system must be premised on existance of fully acceptable quality."

In Training Letters to all regional offices, the various aspects of premature actions to claim credit for completed work were documented by the Director of the Compensation and Pension Service. Training letters were written to point out areas where training should be concentrated. Usually the problem areas were identified by the Central Office quality review staff during their review of individual cases.

The training letters dated April 10, 1985, and November 5, 1985 identified several problem areas pertinant to this question. The training letter dated April 10, 1985 noted in its second paragraph that, "Rating boards are required to rate all of the issues of a disability or final death claim, whether explicit or inferred, before the final end product is taken." However the sixth paragraph of this letter stated, "The CO SQC continues to note extensive improprieties with end product controls: 33c for improper recording, 33e for premature recording, 33f for recording of multiple end products, and 33g for any combination of the above exceptions or for a situation not elsewhere listed. The underlying principle remains the same -- the control cannot be cleared until all the issues contained in a claim are resolved (M21-4, 2.06b)."

The training letter dated November 5, 1985 noted in its fourth paragraph, "When requesting evidence from a claimant, the claimant should generally be given 60 days to furnish the requested evidence before taking any action based upon failure to prosecute (M21-1, 7.01b). Many offices are inappropriately giving the claimant 15, 30, or 45 days before clearing the control, when such periods of time are not authorized by either the M21-1 or the regulations." The sixth paragraph of this letter stated, "It appears that many rating boards are not fully considering the doctrine of reasonable doubt when adjudicating a claim for service connection or determining the degree of disability (38CFR 3.102; Paragraph 3, Schedule for Rating Disabilities)."

The training letters were a frank admission by the Director of the Compensation and Pension Service that there were serious problems regarding the fairness of the adjudication process. However a recent Task Force report conducted by high Cebtral Office and regional office officials, virtually admitted that adjudication statistics were falsified.

In 1986, a Task Force to review quality and timeliness standards was established by the Deputy Chief Benefits Director for Program Management. The concern of the Deputy Director was, " Whatever the measures are that are being used in assessing the quality and timeliness of Veterans Administration services, they be realistic, valid and believable, not only internally, but to any exterior review."

The Task Force met in May and June of 1987. The following quote taken from a discussion by the Task Force on station quality review and validation, confirms the fact that quality statistics provided by the Veterans Administration for its adjudication divisions are not accurate. "The station SQC presently being performed is biased for many reasons. The SQC is accomplished by individuals of varying expertise and the quality of the review is affected by other demands on the reviewer's time. In most, instances, division and station management's performance standards are tied to the current standards. Self preservation dictates that error rates will be manipulated to fall within the standards. Because of these inherent biases,, the present SQC process has been severly criticized by the OIG and other elements within the VA."

In 1982, the Inspector General stated, "The audit disclosed that actual error rates exceeded those reported by supervisory personnel by a substantial margin. The present system of having personnel review a procedure they are responsible for supervising presents a basic conflict of management responsibility."

I agree with the Inspector General. I would also like to add that the present management evaluation system places the adjudication divisions in an adverserial position to those claiming benefits.

Question 16

Response: My survey trip experience and my Central Office quality review experience combined with the findings and comments of other knowledgeable Central Office Compensation and Pension Consultants, reveal that, to the detriment of veterans, some regional offices overemphasize claiming credit for completed work. Please see the section in the white paper on due process entitled, The Management Evaluation System (page 31).

The following example will help answer this question. On February 7, 1985 the Director of the Washington regional office wrote a memorandum to all his employees on the subject of productivity improvement. He stated in part, " WRO productivity for the 1st Quarter FY 85 was 70%, compared to the national average of 80%. This is worst start that WRO has ever had. WRO ranked 57th of the 59 field facilities. In comparing our performance with 9 other similarly sized stations we rank last, and when contrasting our productivity percentage with 9 other regional offices located in large metropolitan areas we again come in last. WRO effectiveness of 99% was the lowest in the nation."

The Director of the Washington regional office went on to say that, "This abysmal performance is totally unaceptable, unjustifiable, and intolerable and must be reversed immediatly if we are to maintain the viability of the Washington Regional Office now, and in the years ahead."

It is obvious that the Director of the Washington Regional Office evidenced great concern about productivity statistics. However, as bad as the productivity statistics were for his regional office, its quality situation was even worse. The March 1985, Central Office Staff Assistance Visit to the Washington Regional Office found problems in almost every area of the adjudication division. The Central Office team found many instances of regional office statistical manipulation designed to improve productivity, timeliness and effectiveness figures. For example, some claims were deliberately not controlled, credit for completed work was prematurely taken, some controls were prematurely cancelled, erroneous dates of claim were used to improve statistical reports and claims were improperly denied without notice to the veteran if the adjudication division had trouble obtaining evidence that it was obligated, by regulation, to procure.

The survey team, found evidence of incompetence compounded by indifferent adjudication management. For example, the survey team's report found inadequate development of claims, raring board quality review conducted by people without rating board experience and violation of due process procedures involving hearings.

The Central Office survey team looked at 21 cases on which the regional office has performed its own quality review. Unbelievably the Central Office team found an additional 20 errors which should have even charged against the regional office. In addition, the survey team found that about 20 percent of all pending claims for compensation or pension benefits were not under control. This meant that adjudication management was not even aware that these claims existed.

Most telling was the discovery that none of the mid level adjudication managers interviewed has performed the quality checks for the personnel under their supervision. The report stated, "The standards for the various production personnel require the review of a specific number of their adjudication actions per review year for the appraisal of quality: 25 cases per four month period or 75 each year for the Claims Clerk, the Adjudicator, and the Senior Adjudicator, and 20 cases per quarter or 80 cases each year for the Rating Specialist. Such reviews are essential in order to compile the data necessary to judge quality levels of the individual employees for the given review period. In interviewing both Section Chiefs and two of the Unit Chiefs it was determined that none of the four had performed the required quality review for the personnel under their authority. With the review year ending in a matter of days on March 31, 1985, the absence of comprehensive quality review data would in effect negate the value of the standards in asserting individual performance."

The letter from the Director of the Washington Regional Office and the findings of the survey team reveal that Washington Regional Office adjudication management was at best incompetent. There is no doubt statistics were manipulated. However, according to the regional office Director even the manipulated statistics were unacceptable.

Shortly after the Central Office report was completed, I was told that the Assistant Adjudication Officer in the Washington Regional Office was promoted to Assistant Director for Field Operations for the Compensation and Pension Service, in Central Office. Why did this happen? This man was responsible for the management of a terrible adjudication division.

To add insult to injury the former Assistant Adjudication Officer was made the supervisor of the Central Office consultant in charge of the survey team. As soon as he could the former Washington, Regional Office Assistant Adjudication Officer lowered the evaluation of the survey team leader two levels, inspite of the fact that this consultant had been evaluated as outstanding for the past two years.

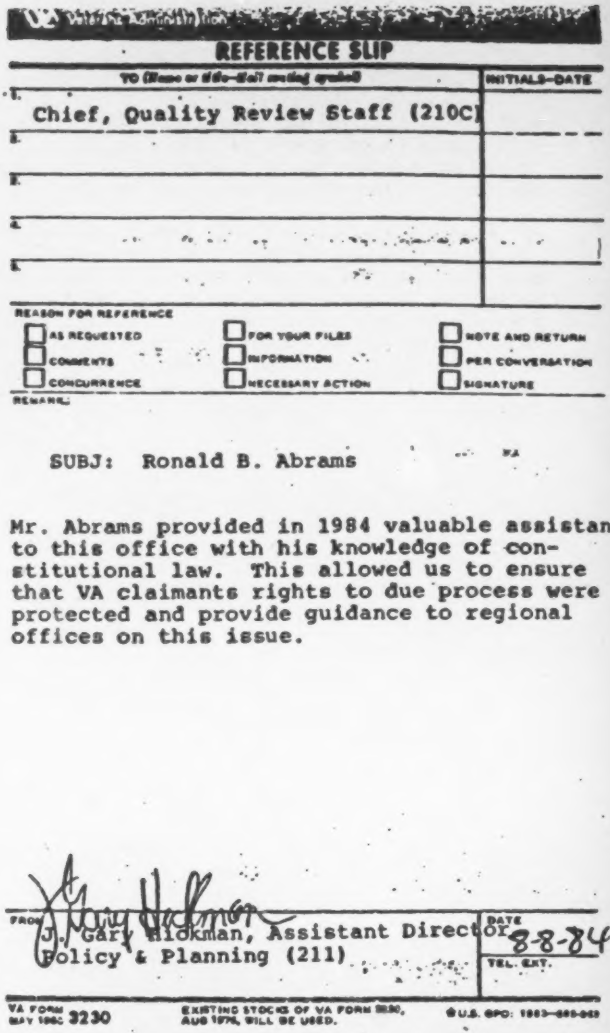
I also suggest you talk to Jack Frost, a current employee of the Compensation and Pension Service. It is my understanding that Mr. Frost can provide examples that will answer the last part of this question.

Justification for Commendation

Ronald B. Abrams

With the implication of several law suits confronting the agency - in particular with regard to the agency providing procedural due process to beneficiaries prior to any adverse action, it became necessary to determine where we stood rather than be picked apart on a piecemeal basis by the Judiciary.

Mr. Abrams has prepared a well thought out and documented paper titled "Procedural Due Process-Its Application to the Compensation and Pension Program". This 44 page document plus attachments lays out the problem, reviews where we are and recommends the regulations and procedural manual sections which should be reviewed for possible change. The document also is being disseminated to the Adjudication Officers for enlightment and guidance regarding this touchy area. Mr. Abrams spent an inordinate amount of time in researching and writing this treatise and deserves the gratitude of the Agency for this particular work product.



Veterans Administration

REFERENCE SLIP

TO (Name or title—Mail routing symbol)	INITIALS—DATE
1. Chief, Quality Review Staff (210C)	
2.	
3.	
4.	
5.	

REASON FOR REFERENCE

☐ AS REQUESTED
☐ COMMENTS
☐ CONCURRENCE
☐ FOR YOUR FILES
☐ INFORMATION
☐ NECESSARY ACTION
☐ NOTE AND RETURN
☐ PER CONVERSATION
☐ SIGNATURE

REMARKS:

SUBJ: Ronald B. Abrams

Mr. Abrams provided in 1984 valuable assistance to this office with his knowledge of constitutional law. This allowed us to ensure that VA claimants rights to due process were protected and provide guidance to regional offices on this issue.

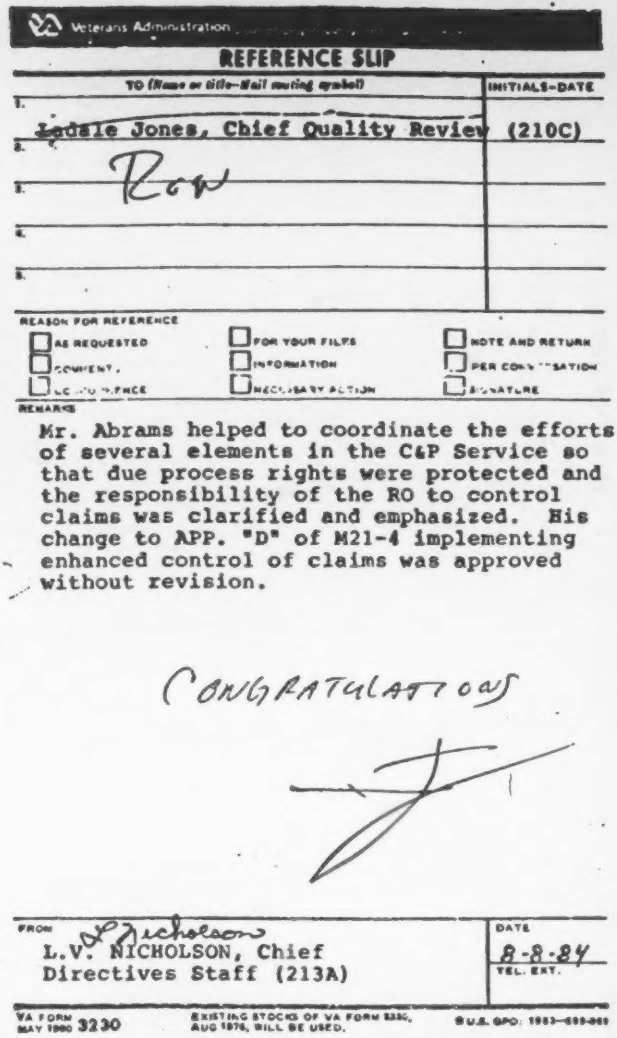
J. Gary Hickman

FROM: J. Gary Hickman, Assistant Director
Policy & Planning (211)

DATE 8-8-84

TEL. EXT.

VA FORM MAY 1980 3230 EXISTING STOCKS OF VA FORM 3230, AUG 1976, WILL BE USED. ☆U.S. GPO: 1983-[illegible]



Veterans Administration

REFERENCE SLIP

TO (Name or title—Mail routing symbol)	INITIALS-DATE
1. Ladale Jones, Chief Quality Review (210C)	
2. Row	
3.	
4.	
5.	

REASON FOR REFERENCE

☐ AS REQUESTED ☐ FOR YOUR FILES ☐ NOTE AND RETURN

☐ COMMENT ☐ INFORMATION ☐ PER CONVERSATION

☐ CONCURRENCE ☐ NECESSARY ACTION ☐ SIGNATURE

REMARKS

Mr. Abrams helped to coordinate the efforts of several elements in the C&P Service so that due process rights were protected and the responsibility of the RO to control claims was clarified and emphasized. His change to APP. "D" of M21-4 implementing enhanced control of claims was approved without revision.

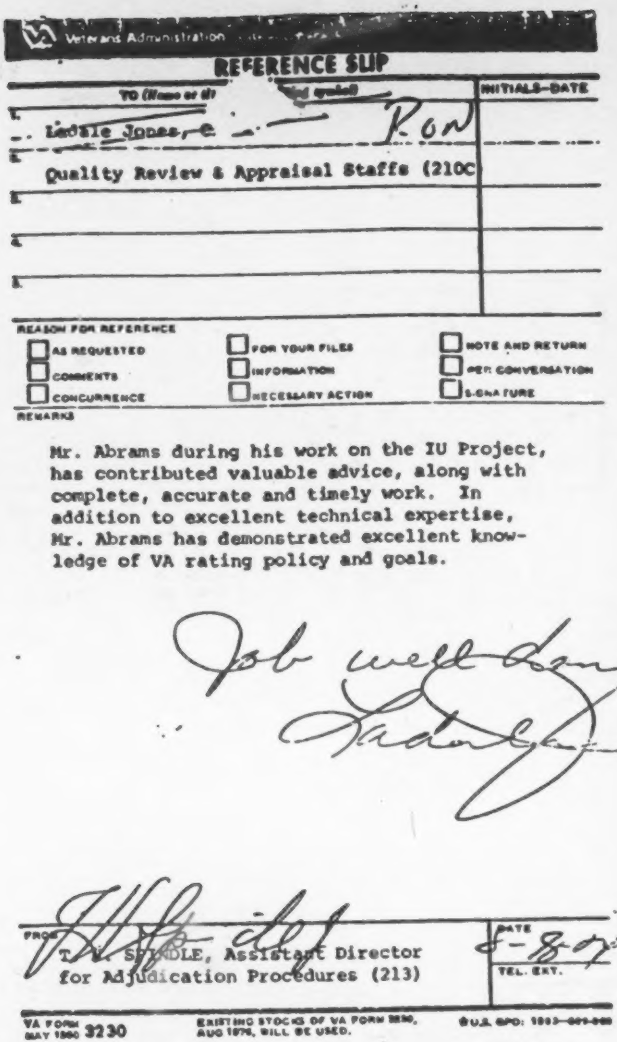
CONGRATULATIONS

FROM L Nicholson
L.V. NICHOLSON, Chief
Directives Staff (213A)

DATE 8-8-84

TEL. EXT.

VA FORM MAY 1980 3230 EXISTING STOCKS OF VA FORM 3230, AUG 1976, WILL BE USED. U.S. GPO: 1983-[illegible]



Veterans Administration

REFERENCE SLIP

TO (Name or [illegible] symbol)	INITIALS—DATE
1. Ledale Jones, e — RON	
2. Quality Review & Appraisal Staffs (210C	
3.	
4.	
5.	

REASON FOR REFERENCE

☐ AS REQUESTED
☐ COMMENTS
☐ CONCURRENCE
☐ FOR YOUR FILES
☐ INFORMATION
☐ NECESSARY ACTION
☐ NOTE AND RETURN
☐ PER CONVERSATION
☐ SIGNATURE

REMARKS

Mr. Abrams during his work on the IU Project, has contributed valuable advice, along with complete, accurate and timely work. In addition to excellent technical expertise, Mr. Abrams has demonstrated excellent knowledge of VA rating policy and goals.

Job well done

FROM T. [illegible] SPINDLE, Assistant Director for Adjudication Procedures (213)

DATE 5-8-87

TEL. EXT.

VA FORM MAY 1980 3230

EXISTING STOCKS OF VA FORM 3230, AUG 1975, WILL BE USED.

U.S. GPO: 1983-[illegible]

SECTION B

ACTUAL ACHIEVEMENT DESCRIBE ACTUAL ACHIEVEMENTS, AND IF APPROPRIATE DISCUSS MANNER IN WHICH THE PERFORMANCE STANDARDS WERE OR WERE NOT MET. IF ANY COLUMN OTHER THAN "MET" IS CHECKED, ACTUAL ACHIEVEMENT MUST BE DISCUSSED IN DETAIL.	LEVEL OF ACHIEVEMENT FAR EXCEEDED	EXCEEDED	MET	FAILED TO MEET
1. Mr. Abrams reviewed 2883 cases, averaging 139.10 cases per week. He accumulated 1917 error points found, averaging 92.5 error points per week. He returned 100% of the folders he reviewed within 15 workdays.	X			
2. No complaints were received.	X			
3. Mr. Abrams was assigned to 2 survey visits. On both visits, he was instrumental in identifying local problems and suggesting appropriate solutions. Mr. Abrams work during a visit to a western area regional office was praised by the Area Field Director.	X			
4. Mr. Abrams was assigned by the Director of the C&P Service to a special Individual Unemployability project. It was reported that his work was timely, complete and accurate. It was also noted that he contributed valuable advice and demonstrated excellent knowledge of VA rating policy and goals.	X			
5. Mr. Abrams outstanding production and analysis of cases while doing SQC, led to his identifying several situations that must be safeguarded against fraud, waste and abuse. He recognized several situations involving patterns in ROs that revealed serious control errors and due process violations. He was able to coordinate the efforts of several elements in the C&P Service so that due process rights were protected and proper control of claims was emphasized. Mr. Abrams change to M21-4, App. D was approved without revision. His knowledge of constitutional law was recognized by another Assistant Director.	X X			

SECTION C

ADDITIONAL SIGNIFICANT ACCOMPLISHMENTS

To be considered only when they have had a significant positive effect on overall performance.

NARRATIVE SUMMARY

This section requires you to summarize your overall evaluation of the employee's performance and comment on the supervisory/managerial skills demonstrated during the rating period. (Leadership, the ability to plan, organize, delegate, develop and motivate subordinates, effective use of time, promoting cooperation, making decisions, improving procedures and systems, etc.) Also comment on capacity to assume a more responsible position.

Abrams is extremely competent and conscientious. He accepts additional esponsibility enthusiastically and constantly devotes his considerable energy improve his knowledge and the operation of 210C. He is of tremendous sistance to his co-workers.

Abrams has demonstrated marked leadership ability, a through knowledge of VA C&P Program and an excellent legal background. These attributes combined th his enthusiastic devotion to the work of the VA, mark him as a serious ndidate for promotion.

Abrams is very reliable. Projects, papers and other assignments given to will be completed, on time, in a competent professional manner. When I call on him, I know I can count on Mr. Abrams to represent 210C in an outstanding shion.

[redacted]

Section B, Actual Achievement

Ronald B. Abrams

lement 1: (Critical)

iewed 547 cases, averaging 29.17 cases per day following exclusion of oductive time of 1410 hours. He accumulated 478.5 error points found. ases were released on time and he had less than a 2% withdrawal rate.

lement 2:

umber and name of the contacts are unknown. No valid complaints were t to management's attention.

lement 3:

ade 3 survey visits. At these stations, he assisted in the identification ocal problems and suggested appropriate solutions. For example, at one e he left a copy of his notes for training purposes, at another office, he asked to teach a class and at a third office he prepared a memorandum for adjudication officer that was used to change station policy regarding ctive dates.

Element 4:

repared 4 memorandums for the staff of 210C dealing with definition of laim, effective dates for pension and premature denial and claims, development [illegible]ncy issues and the end products associated therewith. He prepared [illegible] dealing with due process and quality codes, 3 white appers on Canadian [illegible] American Adjudication of Veteran's claims, SQC review procedures and R.O. quality measured by local and Central Office SQC. A detailed paper on procedural due process was prepared and widely disseminated. He also was an instructor at an Assistant Adjudication Officer's conference.

Key Element 5:

His SQC activity led to the identification of several situations involving fraud, waste, abuse and due process violations. He was able to coordinate within the service efforts to alert those elements charged with providing direction to regional offices.

SECTION C

ADDITIONAL SIGNIFICANT ACCOMPLISHMENTS

To be considered only when they have had a significant positive effect on overall performance.

He was selected to receive DVB's "Direct Service to the Public" Award in June 1985. He acted as the lead person of his unit when the unit chief was absent and functioned as the technical advisor when the chief was present or absent. His work on the due process has brought new interest and action to a subject which is overlooked in today's world of production only.*

NARRATIVE SUMMARY

This section requires you to summarize your overall evaluation of the employee's performance and comment on the supervisory managerial skills demonstrated during the rating period. (Leadership, the ability to plan, organize, delegate, develop and motivate subordinates, effective use of time, promoting cooperation, making decisions, improving procedures and systems, etc.) Also comment on capacity to assume a more responsible position.

Mr. Abrams has shown potential for greater work assignments. He recently completed a lengthy paper on procedural due process. He is motivated, works hard and can be counted on when called to produce work which is of acceptable quality. He has the potential and capacity to assume a more responsible position.

* Since May 27, 1985, Mr. Abrams has been with a new unit. The new supervisor reports that he is pleased with Mr. Abrams' performance and certain tasks have been handled at a Far Exceeded level.

Veterans Administration

SPECIALIZED CATEGORY APPRAISAL WITH NARRATIVE

NAME OF EMPLOYEE Ronald Abrams	PRESENT POSITION AND GRADE	CURRENT ORGANIZATION
ANNOUNCEMENT NO. DVB 85-12	POSITION APPLIED FOR (Title and grade) Veterans Claims Examiner GM-14	ORGANIZATIONAL LOCATION OF POSITION Comp. & Pension Service

INSTRUCTIONS: The information furnished on this form will be important in determining the degree to which the employee possesses the *Knowledge, Skills, Abilities, and Other characteristics* (KSAO's) which are required for performance in the position being filled. In Column II below, the supervisor and/or reviewer will indicate beside the Rating Factor (KSAO) or Job Element listed in Column I, the number of the Category Rating (0 to 5) which best describes the employee's performance with respect to the Rating Factor (KSAO) or Job Element. If the employee's current job does not include any of the KSAO's in the Rating Factor or Job Element and, therefore, performance in them has not been observed, *mark "0"*. In Column III, for each Rating Factor or Job Element, give specific examples which show how the employee's performance justifies the Category Rating assigned. If more space is required, use additional sheets of paper and include the name of the supervisor at the top of each sheet and identify the appropriate Rating Factor or Job Element.
NOTE: This form may be used for comments by the supervisor followed by those of the reviewer or separate forms may be used for each. If separate forms are used for the supervisor and the reviewer, the supervisor's appraisal should be made available to the reviewer during the review process.

CATEGORY RATINGS

5 Employee's performance exceeds expectations to such an extent that it warrants special mention for placement consideration.

4 Employee has demonstrated the Rating Factor (KSAO) or Job Element to a degree that is clearly above that expected of a fully competent employee and you would expect the employee to display the same degree of ability in the position applied for.

3 Employee has demonstrated the Rating Factor (KSAO) or Job Element to the full extent expected of a thoroughly competent employee and you would recommend the employee with confidence for another position in which the Rating Factor (KSAO) or Job Element is important.

2 Employee's performance relative to the Rating Factor (KSAO) or Job Element is acceptable but you would have some reservations about recommending the employee for another position in which the Rating Factor (KSAO) or Job Element is important.

1 Employee's performance relative to the Rating Factor (KSAO) or Job Element exhibits some definite weaknesses.

0 Unable to appraise. (When this category is used, cite reason - *e.g., current job does not include the KSAO's in this Rating Factor or Job element.)*

COLUMN I RATING FACTOR (KSAO) OR JOB ELEMENT	COLUMN II CATEGORY	COLUMN III NARRATIVE: *Specific examples of what the employee has or has not done to cause me to award this rating.*
1. Ability to manage (plan, organize, direct, control, review, etc.) the work activities of a program.	4	As the acting chief of Statistical Quality Review staff, Mr. Abrams began to coordinate a fragmented unit into one which acted and performed as a unit-that is the decisions became uniform. This took place because he saw the disparity and coordinated a common methodology.
2. Ability to orally communicate complex information to the public and employees.	4	He performed exceptionally well at the Assistant Adjudication Officers Conference. At internal meeting within the C&P service, he states his position and reasoning for it in a forceful but enthusiastic manner.

RATING FACTOR (KSAO) OR JOB ELEMENT	CATEGORY RATING	NARRATIVE: *Specific examples of what the employee has or has not done to award this rating.*
3. Ability to analyze (review and evaluate), comprehend and apply decisions derived from a variety of data or complex information.	4	He has analyzed the type and quanity of errors called by regional offices and by the SQC Centr Office. From this information, he has made several comprehensive recommendation which are awaiting further review by the new assistant director for field services.
4. Knowledge of veterans benefits and associated administrative and support programs.	5	He has worked at both the regional office and Central Office. Exposure to only one would be insufficient knowledge of programs and rationale behind the programs. His current extra curricula work on due process has been exceptional and one which will assist the Agency in forthcoming changes to regulations and procedures.

COLUMN I RATING FACTOR (KSAO) OR JOB ELEMENT	COLUMN II RATING CATEGORY	COLUMN III NARRATIVE: *Specific examples of what the employee has or has not done to earn or merit this rating.*
5. Ability to review and/or initiate written communications derived from complex and technical material.	5	His analysis of the number and type of errors called by VACO SQC and resulting white papers on the subject demonstrate this attribute.
6. Knowledge of personnel and other management systems (to include Equal Employment Opportunity requirements.)	4	His VA and outside exposure to management systems are acknowledged as sufficient to appropriately deal with personnel matters.

SIGNATURE OF SUPERVISOR J. GARY HICKMAN J. Gary Hickman	DATE 3-19-85	TOTAL TIME YOU SUPERVISED EMPLOYEE FROM Oct. 84 TO 3-15-85
SIGNATURE OF REVIEWER HERBERT R. MARS	DATE 3-4-85	TOTAL TIME EMPLOYEE UNDER YOUR DIRECT OR INDIRECT SUPERVISION FROM 10-81 TO [illegible]
		DATE

Veterans Administration

Regional Office
1000 Liberty Avenue
Pittsburgh, PA 15222

RECEIVED
OFFICE OF DIRECTOR
APR 16 1985
COMP. & PEN. SVC. (21)
REFERRED TO

April 11, 1985

In Reply Refer To: 311/21

Field Director, Eastern Region (21)
VA Central Office
810 Vermont Avenue, N.W.
Washington, DC 20420

SUBJ: Central Office Staff Visit to Pittsburgh Regional Office

1. We have reviewed your Report of Compensation and Pension Service Visit and the Regularly Scheduled Staff Analysis of Adjudication Operations.

2. All of your recommendations are concurred in and all are being implemented. The Staff is preparing a more detailed report.

3. We would be remiss if we did not recognize the excellent service and assistance given to our Adjudication Staff by the Team, Messers. Ron Abrams, Barry Boskovich, and Steve Tomasek. Please pass our compliments on for a job well done.

4. Their expertise in Adjudication operations and management was evident throughout their visit. Each team member was extremely personable, understanding and competent in conducting his segment of the Staff Visit.

5. Because of their excellent comments and discussions with our staff and employees regarding the recommendations we have been able to take corrective action immediately. We can say without reservation this was a service visit and a productive one. Our compliments to the C&P Service.

Harold T. Bushey
HAROLD T. BUSHEY
Director

Veterans Administration

Memorandum

Date: 9/25/86

From: **Ronald B. Abrams, Legal Consultant**

Subj: **Documentation of Due Process/NARS v. Walters/Analysis/Suggested Actions**

To: **Director, Compensation and Pension Service (21)**
THRU: Assistant Director, Adjudication Procedures
THRU: Chief, Project Staff

1. The constitutionality of the $10 limit on attorney's fees mandated by 38 USC 3404 is being challenged by the plaintiffs in the NARS case. The plaintiffs contend that the fee cap, on its face and as applied to them, violated their due process rights under the fifth amendment and their right to petition the government under the first amendment.

2. On June 12, 1984 the district court entered a nationwide preliminary injunction barring the VA from enforcing the fee limitation. The district court, Judge Patel, held there was a high likelihood that the plaintiffs would prevail on their procedural due process claim. The district court also held that in the absence of a compelling government interest for the fee cap, the plaintiffs appeared likely to prevail on their challenge to the statute under the first amendment. The district court determined there was a high likelihood that the statute, on its face was unconstitutional.

3. On June 28, 1985 the Supreme Court, Justice Rehnquist, overturned the preliminary injunction against the enforcement of the fee cap. Although the Court ruled on just the preliminary injunction, Justice Rehnquist's opinion involved itself in the merits of the case. The NARS case is now being tried in district court on the merits.

4. As a result of the requests for evidence and our recent depositions, plaintiff's attorney, Mr. Erspamer, has a good understanding of VA claims adjudication procedures. Because it is probable that you will be required to give another deposition, I feel it is my duty to prepare you for Mr. Erspamer's questions. I discussed this with you on September 3, 1986. At that time you gave me permission to prepare this memorandum.

5. Almost everyone connected or involved with this case feels that there is, in view of the previous district court decision, a high likelihood that the plaintiffs will again prevail in district court. I also believe that Judge Patel will rule in favor of the plaintiffs.

. 2.

Documentation of Due Process/NARS v. Walters/Analysis/Suggestions

6. If we lose in district court, it is probable that the VA will eventually appeal to the Supreme Court. In order to understand how to best counter Mr. Erspamer, we should first analyse the Supreme Court decision.

7. Of the nine Supreme Court Justices, three found the statute unconstitutional on its face (Stevens, Marshall, Brennan). I predict that these justices will again find for the plaintiffs if the case reaches the Supreme Court. Also Justice O'Connor and Justice Blackmun concurred with Justice Rehnquist only in the decision to invalidate the preliminary injunction. They did not reach the merits. Therefore, it is possible that a majority of the Supreme Court could find for the plaintiffs, five to four.

8. The Supreme Court decision elicited several law review commentaries including a recent Harvard Law Review article. We must assume that Mr. Erspamer has carefully read the Supreme Court decision and the law review commentaries. Please note that the law review articles attack the legal underpinning of the Supreme Court decision.

9. Because Justice Rehnquist, in my opinion, prematurely involved the Court in the merits of this case, Mr. Erspamer also knows what factual evidence he has to present in order to win his case in the Supreme Court. Now that his case is being tried on the merits, Mr. Erspamer, courtesy of Justice Rehnquist and the law review articles, has a detailed blueprint on how to best present his case. Essentially Justice Rehnquist requires evidence of systemic unfairness in our procedures in order to find for the plaintiffs.

10. Justice Rehnquist dismissed the first amendment argument as having no independent significance. The commentators have attacked this position. Please note that the Supreme Court has previously held that, "The petition clause vests organizations and individuals with the right to employ counsel in pressing individual claims against the government". (See United Mine Workers Dist. 12 v. Illinois State Bar. Ass'n, 389 U.S. 217 (1967) and California Motor Transp. v. Trucking Unltd., 404 U.S. 503 (1972).

11. It is possible that the Supreme Court will reverse its decision regarding the first amendment argument. If it does I believe our statute will be overturned as unconstitutional. The Justice Department and our General Counsel have their hands full with this legal issue.

12. Alternatively, Mr. Erspamer will attack our due process procedures on two fronts. First, he will attempt to broadly define a "complex claim". The Supreme Court stated that the evidence presented did not adequately define the term, "complex claim". Second, he will characterize our claims adjudication process as unfair and unreasonable.

13. Mr. Erspamer will define a "complex claim", as a claim that requires any of the following: extensive development, difficult factual determinations, knowledgeable application of a vague rating schedule, identification of obscure claims, analysis of intricate issues and identification of inferred issues. I believe Mr. Erspamer will argue that thirty to fifty percent of compensation and pension claims are complex.

14. Mr. Erspamer will try to prove that our adjudication process systematically denies procedural due process. He will argue that our system is unfair and counteractive. He will contend that our management evaluation system emphasizes productivity and timeliness to such an extent that our managers are encouraged to violate the due process rights of our claimants.

15. Mr. Erspamer can show that it is in the best interest of our managers to have their people do, as quickly as they can, as many cases as possible. He can also show that adjudication duties dealing with the fairness of the adjudication process such as: control of claims, supervisory review of old claims, thorough development, recognition of all issues, providing adequate notice, documenting that notice was given, and careful quality review, tend to adversely affect gross productivity and timeliness statistics.

16. Because central office does not require its regional offices to validate their local quality review, Mr. Erspamer will contend that it is in the best interest of some of our managers to deny or ignore the due process rights of their claimants. He will argue that because due process procedures increase the time it takes to adjudicate a claim, thereby slowing production, it is not in the best financial interest of our managers to follow our regulations and directives dealing with due process.

17. Mr. Erspamer can show that a managers' bonus and merit pay evaluation is based in part on the adjudication division's productivity. He will state that our system encourages some adjudication managers to report incorrect quality levels because they know that their failure to do this part of their job will not be held against them. If Mr. Erspamer can show that our system pits the financial interest of adjudication officers against the fair and reasonable treatment of our claimants, he would be well on his way to proving the VA does have an unfair, adversarial claims adjudication system.

18. Mr. Erspamer has obtained reports identifying regional offices that prematurely denied claims without notice so that credit for completed work could be taken (Baltimore). He has survey trip reports and white papers documenting that certain stations: ignored claims (Phoenix), established and cancelled controls improperly (Baltimore, Hartford, San Francisco, WRO), discouraged complete development (Baltimore), ignored or didn't emphasize documentation of due process and carelessly performed local quality review (many regional offices).

19. The way to win this case is to distance the Compensation and Pension service, The Department of Veterans Benefits and the Veterans Administration from the people who, to improve their performance evaluations, abused our claims processing system and violated the rights of our claimants. I strongly suggest you, as Director of our Service, take appropriate administrative action against supervisors who, for whatever reason, encouraged or knowingly permitted the gross violation of the constitutional rights of claimants.

20. Your record as a manager is unblemished. You have approved every project, white paper, TWX, circular and M21-1 change we have prepared that improved our due process procedures. At this time I respectfully suggest you take the following actions to bolster the VA's position in the NARS case.

First, please approve the version of the enclosed TWX that includes paragraph four. For your information I enclose a copy of the memo written to you in April 1985, regarding documentation of due process. As you know this memo was destroyed before you had the opportunity to read it. Because paragraph four of this TWX deals with quality review, as well as documentation of due process, I ask you to direct section 214, to concur with this TWX.

Second, I suggest we propose to the Chief Benefits Director that he require a central office validation criteria for all adjudication managers regarding local quality review.

Third, I suggest we in 213B, call in several hundred cases to study whether or not Target generated letters are in the claims folder and whether notice was adequate.

Fourth, Because section 214 is changing M21-4 regarding the weight assigned to various error calls, I suggest you ask 214 to send the M21-4 change to 213B for concurrence. Enforcement of due process is not the sole concern of 214.

21. Whenever a case goes to the Supreme Court there is never a great deal of certainty. Judges, even Supreme Court Justices, have a tendency to reach a conclusion and then search for law to support their positions. If Mr. Erspamer can convince just two of six justicies that our adjudication process is unfair, I predict WE WILL LOSE!

22. We cannot defend the actions taken by some regional office and central office supervisors and win this case. Mr. Erspamer will present evidence tending to show the adjudication process is unreasonable and unfair. If we down play in Court; violations of VA rules by VA supervisors regarding the fairness of adjudication claims processing, the plaintiffs will prevail.

23. The due process clause assures reasonable procedural protections, applicable to the fair determination of the particular issues presented in a given case. (See Plato v. Roudebush 397F. Supp. 1295, (1975).) If the Court finds that our claims processing system is unfair, because VA managers are knowingly permitted to violate VA regulations and directives, I predict a majority of the Court will search for and find the "law" to overturn our statute.

24. The best approach would be to describe the improper actions as anomalies and aberrations. Explain that we in Central Office, under your direction, have been investigating these matters for a period of time. Although proving these improprieties was difficult and time consuming, we now have enough evidence to act. (See paragraph 18 supra.) Argue that our internal actions show the inherent systemic fairness of the VA adjudication process.

25. I do not think a majority of the Supreme Court wants to overturn the fee cap. However, if we back this court into a corner, do not assume that our current adjudication system will continue. The emotionalism generated by this case and the resultant publicity may affect the district court and even the Supreme Court. In addition, the facts presented by Mr. Erspamer may be used by those on the hill in favor of judicial review.

26. This memorandum is confidential. Because of its sensitive nature, I request that you not show this to anyone. I especially request that this memorandum not be seen by anyone in Section 214.

Ronald B. Abrams
RONALD B. ABRAMS

ALAN CRANSTON, CALIFORNIA, CHAIRMAN

SPARK M. M. MATSUNAGA, HAWAII
DENNIS DeCONCINI, ARIZONA
GEORGE J. MITCHELL, MAINE
JOHN D. ROCKEFELLER IV, WEST VIRGINIA
BOB GRAHAM, FLORIDA

FRANK H. MURKOWSKI, ALASKA
ALAN K. SIMPSON, WYOMING
STROM THURMOND, SOUTH CAROLINA
ROBERT T. STAFFORD, VERMONT
ARLEN SPECTER, PENNSYLVANIA

JONATHAN R. STEINBERG, CHIEF COUNSEL/STAFF DIRECTOR
ANTHONY J. PRINCIPI, MINORITY CHIEF COUNSEL/STAFF DIRECTOR

United States Senate
COMMITTEE ON VETERANS' AFFAIRS
WASHINGTON, DC 20510-6375

Personal and Confidential

July 15, 1987

Ronald Abrams, Esq. (202B)
Veterans' Administration
Room 466
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Dear Mr. Abrams:

I have enclosed the following questions relating to the March 17, 1987, joint Congressional oversight hearing of the Senate and House Committees on Veterans' Affairs which considered the imposition of a fine on the Veterans' Administration for its failure to comply with civil discovery requests in the case of NARS v. Turnage, and ancillary issues related to the VA's claims adjudication system. I apologize for the delay in forwarding these questions.

Please respond to the questions to the best of your ability, and in accordance with any limitations, instructions, or conditions which you may still be subject to as a result of any court order imposed upon you in the NARS v. Turnage litigation, or any other official proceedings or matters related to the litigation.

Thank you for your cooperation and assistance in the hearing, and I look forward to your responses as soon as possible so your responses may be included in the hearing record.

Sincerely,

Frank H. Murkowski

Frank H. Murkowski
Ranking Minority Member

Enclosure

Questions Submitted by Senator Frank H. Murkowski Following the Joint Hearing on NARS v. Turnage March 17, 1987

1. Have you been contacted by the Department of Justice, the FBI, or any other federal agency or department concerning any investigation into allegations of obstruction of justice or allegations of harassment against you or anyone else in relation to the National Association of Radiation Survivors v. Turnage litigation, and any proceedings or matters related thereto?

2. Are you currently under a court order not to discuss the testimony you gave in the NARS case? Are you subject to any court order regarding your participation in the hearing? If so, please indicate for each question which you feel you can not respond.

3. Have you reported to the appropriate officials within the VA and to other appropriate officials, including Judge Patel, any and all incidents in which you feel you may have been treated adversely and without justification as a result of your participation as a witness in the NARS litigation, this hearing, or any other official proceeding related thereto?

4. Have you experienced any unjust and adverse treatment as a direct result of your participation as a witness at the hearing? If so, please explain.

5. In your opinion, are there other VA employees who were not invited to appear before the Committees who might have relevant information concerning the subject matter covered by the hearing and which would not be redundant or cumulative with the testimony received by the Committees? If so, please indicate who these individuals are.

6. In your various duties within the VA, do you have any first-hand knowledge of a conspiracy within the Agency concerning claims adjudication or any matters related to the NARS v. Turnage litigation?

7. Do you have any first-hand knowledge of the June, 1986, destruction of Compensation and Pension Service field operations file materials? If so, please summarize briefly the extent of your personal knowledge.

8. Did you, or did you not, indicate to your supervisors, shortly before you called Judge Patel on January 7, 1987, that you would not call the judge with allegations of harassment? If you did indicate this, please (1) explain the circumstances; (2) state the reasons why you changed your mind; and (3) indicate with whom you discussed this.

9. Did you consult with any individuals or organizations, other than the staff of the Veterans' Affairs Committees, in preparation for this hearing?

   - o If so, who are these individuals or organizations?
   - o If so, did you seek their advice or information, or was it volunteered to you?

10. If you have not already provided the Committees with your memorandum entitled "Documentation of Due Process, NARS versus Walters, Suggested Action" for inclusion for the record, please attach it to your responses.

11. You have described at various times during the proceedings of the NARS case, and in your research conducted for the Department of Veterans' Benefits(DVB), that there are three levels of error codes recognized by DVB in the review of the claims adjudication process. You have identified the lowest error level as procedural errors, followed by judgement errors, and substantive errors, in an ascending order of seriousness.

   - o Please summarize briefly your understanding of these three levels of errors and their respective direct and indirect impact on veterans' claims.
   - o Please describe any differences you are aware of regarding how each of these levels of errors are brought to the attention of DVB management, and any differences which you are aware of which may differentiate the priority, thoroughness, and

timeliness of the resolution or follow-up of an error depending on the assigned error classification. If you feel that there is a significant difference in the resolution of the levels of errors, what direct short and long-term impact would a misclassification of an error have on a veteran's claim during the pendency of the claim and on the final grant of benefits if the claim is ultimately granted, or alternatively, denied?

- o What, if any, impact would the under reporting of "end product" codes by a regional office have on the pendency, or ultimate grant or denial, of a veteran's claim? Please direct your response to the impact on the veteran claimant, rather than the issue of employee productivity.

- o Do your know the quantity or percentage of actual or reported errors of each error classification that actually benefited veterans?

12. You apparently disagree with the statement made by the Chief Benefits Director at the hearing in which it was stated that the substantive error rate was one and one-half to two percent. You apparently feel that the error rate is considerably higher, but precise measurement of the rate is difficult or impossible due to your belief that the invalidation rate is so high.

    - o To the best of your knowledge, what do think the substantive error rate is? Please include the basis for, and any assumptions or limitations you make in your response. Also, indicate whether your response reflects a national or regional error rate and whether it is based on sampling methods. Please also indicate your assumptions relating to administrative disallowances and the use of the end product control system.

13. Do you have any data or statistics which would show how many actual claims for benefits were adversely affected (in a material right or in the payment of benefits), as the result of missing documentation of notice letters in claimant's files, in which it was impossible to verify whether the letter was actually sent to the claimant?

14. You have claimed that DVB lacks a validation standard to monitor errors reported by regional offices and you have characterized this as a crucial missing element in the claims adjudication process.

    - o To the best of your knowledge, please summarize briefly, all existing Central Office and specific regional office procedures which validate or monitor error rates in the regional offices. Please include in your response: (1) any validation and enforcement procedures conducted by the Central Office quality review staff and survey teams; (2) the scope of the validation procedures they utilize; (3) and the scope of the review process of the findings and recommendations by DVB managers.
    - o Do you consider the periodic reviews, including site surveys, conducted by the Compensation and Pension Service to be part of a validation system by the VA Central Office to check on the reporting of error rates by regional offices? Please explain.
    - o Taking into consideration administrative feasibility, do you believe that a one-hundred percent validation system is necessary, or would one which is conducted on a sample basis ensure reasonable safeguards?

15. Much has been said during the hearing concerning "quality" versus "quantity" in the VA's claims adjudication system, and how these concepts may affect due process considerations.

    - o Since timely processing of claims is also a significant factor in an effective claims adjudication process, how would you propose the VA claims adjudication process should be operated to provide an effective balance between quality and quantity considerations?

16. To the best of your knowledge, what factors--other than productivity--are considered in promotion, bonus, and pay increase evaluations of adjudicators and regional office managers? What weight is given to each factor, including productivity?

- Is there a documented factual basis for claims that adjudicators' performance for pay and promotion is measured largely by the number of "end products" taken?
- Can you cite performance standards, or promotion or award criteria, for individual adjudicators, unit or section chiefs, or adjudication officers, which are based on the number of end products taken as reported in the AMIS system?
- Can you supply documentation of specific instances where VA managers or adjudicators personally benefited because of "inflated" end product counts as a result of improperly terminating claims?
- Conversely, can you cite instances of VA managers or adjudicators being penalized (or not promoted) because of low end product counts reported by the end product measurement system?

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 6, 1987

Honorable Frank H. Murkowski
United States Senate
Washington, D. C. 20510

Dear Senator Murkowski:

This responds to your letter, dated July 13, 1987, to the Attorney General, relating to National Association of Radiation Survivors, et al. v. Turnage, et al., USDC ND Cal., Civil Action C-83-1861-MP. You have requested information concerning the status of a criminal investigation and costs relating to the above-noted civil litigation. (A copy of your letter is enclosed for your convenience.)

Your first question relates to the status of a criminal investigation. On January 7, 1987, in a telephone hearing before the presiding judge, the Honorable Marilyn Hall Patel, Mr. Ronald Abrams, a Veterans Administration employee, reported that he had been harassed by other Veterans Administration employees because of his testimony in the matter. The Civil Division referred the allegations to the Criminal Division for appropriate action. An investigation of this and related allegations is currently being conducted by the Criminal Division in conjunction with the Federal Bureau of Investigation. The investigation commenced in January 1987. Attorneys in the Civil Division have cooperated in the Criminal Division's investigation by providing copies of transcripts and other documents and by providing additional information as requested by the Criminal Division and the Federal Bureau of Investigation. Because the criminal investigation is pending, it is inappropriate that we provide additional information at this time. Should you wish to be apprised of our prosecutive determination at the conclusion of the investigation, we shall be pleased to provide appropriate information at that time.

Your second question requests information concerning a cost allocation agreement between the Department of Justice and the Veterans Administration relating to litigation support costs, as well as information concerning the projected total costs of the litigation and total expenditures to date. No formal memorandum of understanding is in effect between the Department of Justice and the Veterans Administration regarding the allocation of total projected costs of the litigation. There is a cost-sharing agreement in effect between the two agencies which provides, in effect, that the Veterans Administration will provide approximately $1.25 million to cover some of the costs of automated litigation support in this case.

The trial of this case began on September 8, 1987. While it is difficult to estimate the projected cost of this litigation, a rough estimate is that the Department of Justice has spent approximately $400,000 to date. This figure includes attorney time, overhead, travel expenses, deposition transcripts, and consultants' fees. These costs do not include the costs of producing the voluminous briefing that has been required in this case (the Court docket exceeds 800 items), the cost of copying, and other costs that are not tracked by the Department on a case-by-case basis, such as telecopying and express mail services, which have been used extensively in the case. These costs also do not include the cost of flying Veterans Administration employees stationed in Washington, D.C. to San Francisco for depositions, a cost that the Court has ordered the defendant to pay, or any other costs incurred by the Veterans Administration, or any of the other agencies that have been involved in this action. 1/

Your third question concerns the amount and payment of fines, sanctions and other fees or costs that the government has been ordered to pay during this litigation. The total amount of fines, sanctions, and other fees or costs the government has been ordered to pay during this litigation is approximately $130,500, plus the amounts paid to the Special Master for his assistance. 2/

1/ For example, plaintiffs have been permitted to obtain discovery from the Defense Nuclear Agency, the Departments of Defense, the Navy, the Army, the Air Force, and Energy, as well as other federal agencies who are not defendants in this case. These agencies have produced hundreds of thousands of pages of documents, and the cost estimates do not include the cost of searching for and producing those documents, In addition, employees of those agencies have been deposed, and the cost of the employees' time as well as time of their respective Offices of General Counsel are not included in these cost estimates.

2/ The Court ordered the appointment of a Special Master, Charles A. Horsky, to oversee discovery issues in this case, and ordered that defendants assume the full cost of the Special Master. Mr. Horsky, who is Of Counsel to the law firm of Covington and Burling, has been providing defendants with monthly bills. Through the month of July, Mr. Horsky billed defendants a

(Footnote Continued)

Of that amount, $100,000 has been paid by the Veterans Administration, and the remainder has been paid either by the Department of Justice or from the judgment fund. The determination of the source of payment is based upon federal statutes, including 28 U.S.C. § 2412 (the Equal Access to Justice Act) and interpretations thereof, and with the terms of the Court orders imposing such costs.

We appreciate your interest in this matter.

Sincerely,

John R. Bolton

John R. Bolton
Assistant Attorney General

Enclosure

(Footnote Continued)
total of approximately $25,000, at a rate of $200 per hour, plus other costs and disbursements. The court ordered that the Department of Justice pay the Special Master's fees.

Mr. Horsky has been called upon to resolve a gamut of discovery issues from both parties, as well as discovery issues raised by third parties such as the Disabled American Veterans against plaintiffs. Nevertheless, defendants have been ordered to pay the full cost of Mr. Horsky's time.

United States Senate
COMMITTEE ON VETERANS' AFFAIRS
WASHINGTON, DC 20510-6375

July 13, 1987

Gordon P. Erspamer, Esq.
Morrison & Foerster
California Center
345 California Street
San Francisco, CA 94104-2105

Dear Mr. Erspamer:

I have enclosed the following questions relating to the March 17, 1987, joint Congressional oversight hearing of the Senate and House Committees on Veterans' Affairs regarding the imposition of a fine on the Veterans' Administration for its failure to comply with civil discovery requests in the case of NARS v. Turnage, and ancillary issues related to the VA's claims adjudication system. I apologize for the delay in forwarding these questions.

I ask you to respond to these questions in the capacity in which you appeared as a witness before the Committees' hearing--as an attorney for the National Association of Radiation Survivors--unless otherwise noted.

Thank you for your cooperation, and I look forward to your responses as soon as possible so your responses may be included in the hearing record.

Sincerely,

Frank H. Murkowski

Frank H. Murkowski
Ranking Minority Member

Enclosure

Questions Submitted by
Senator Frank H. Murkowski
Following the Joint Hearing on
NARS v. Turnage
March 17, 1987

1. Have you been contacted by the Department of Justice, the FBI, or any other federal agency or department concerning any investigation into allegations of obstruction of justice or allegations of harassment against you or anyone else in relation to the National Association of Radiation Survivors v. Turnage litigation, and any proceedings or matters related thereto?

2. Are you currently under a court order not to discuss the testimony you gave in the NARS case? Are you subject to any court order regarding your participation in the hearing? If so, please indicate for each question which you feel you can not respond.

3. Have you reported to the appropriate officials within the VA and to other appropriate officials, including Judge Patel, any and all incidents in which you feel you may have been treated adversely and without justification as a result of your participation as a witness in the NARS litigation, this hearing, or any other official proceeding related thereto?

4. Have you experienced any unjust and adverse treatment as a direct result of your participation as a witness at the hearing? If so, please explain.

5. In your opinion, are there other VA employees who were not invited to appear before the Committees who might have relevant information concerning the subject matter covered by the hearing and which would not be redundant or cumulative with the testimony received by the Committees? If so, please indicate who these individuals are.

6. In your various duties within the VA, do you have any first-hand knowledge of a conspiracy within the Agency concerning claims adjudication or any matters related to the NARS v. Turnage litigation?

Please describe briefly the type of validation system you feel would be satisfactory. Taking into account administrative feasibility, do you feel that a one-hundred percent validation system is necessary, or would one which is conducted on a sample basis ensure reasonable safeguards?

5. You stated, in part, during the hearing that "the focus of [your] prepared remarks was to describe the true condition of the [VA] based upon the VA's own studies produced in the NARS case", and "the VA has substituted production goals, adjudication speed, and administrative convenience as its goals of choice. As a result, a series of abuses of veterans' rights have surfaced, and no remedies exist to check them.".

   - Please comment on whether you believe that the internal VA studies you referred to and VA error reports are a necessary and appropriate means established by the VA to provide an internal quality review of the VA claims adjudication process, and an appropriate means of notifying top management of matters upon which it may take necessary action, if management finds it appropriate. Do you believe that the existence of these internal VA studies and reports demonstrates that the VA is monitoring the claims adjudication process?

   - Since timely processing of claims is also a significant factor in an effective claims adjudication process, how would you propose the VA claims adjudication process should be operated to provide an effective balance between quality and quantity considerations?

6. Several bills have been introduced during this session of Congress which would create a new basis for adjudicating the claims of veterans who may have been exposed to ionizing radiation and who develop certain diseases. Some of these approaches, such as S. 453 and S. 1002, would provide a presumption of service connection for certain veterans based on specified conditions and would adjust upward the dose estimates.

   - Please comment on this general approach, as compared to other legislative approaches which have been introduced in the past, focusing your comments on which alternative would provide the maximum benefit to veterans. Please state your reasons.

7. You indicated in your testimony that adjudicators' performance for purposes of promotion and pay increases is measured largely by the accumulation of work credits.

   - o To the best of your knowledge, what other factors are considered and what weight is given to other such factors?

   - o What is the basis for your testimony that adjudicator performance for pay and promotion is measured largely by the number of end products taken? Can you document this assertion?

   - o Can you cite instances where VA managers have personally benefited because of "inflated" end product counts as a result of improperly terminating claims?

   - o Conversely, can you cite instances of VA managers being penalized (or not promoted) because of low end product counts reported by the end product measurement system?

   - o Can you cite performance standards or promotions or award criteria for either individual adjudicators, unit or section chiefs, or adjudication officers which are based on the number of end products taken as reported in the AMIS system?

8. Your testimony and other information seem to rely on anecdotal accounts of problems at individual VA offices.

   - o What specific examples of widespread, systemic problems have you identified in the course of this litigation?

   - o What specific evidence have you identified that supports allegations of systemic problems?

9. Did you make a written or oral request of any member of Congress that a hearing be held on the subject matter of the NARS litigation? If so, (1) please indicate when and to whom such a request was made; (2) please provide for the record, copies of any correspondence you sent or received regarding any such request; (3) for what purpose(s) did you make such a request; (4) was the request related to any particular stage of the litigation; and (5) what did you hope to accomplish through a Congressional hearing which would not be accomplished through the normal judicial process of the pending litigation?

10. Do you interpret 38 CFR 3.103 to require the VA to obtain information in a claimant's possession? How would the VA satisfy this regulation other than by writing to a claimant?

11. You state at page 3 of your written statement that the VA is unique because it is a closed adjudication system resulting largely from the combination of three prohibitions, one of which is that VA decisions "are not subject to judicial review, regardless of how irrational they might be."

    o Please provide any statistics you have to support your claim, including the number of irrational final VA claims decisions and the reasons why you consider them irrational.

12. It has been asserted that the VA relies on material not of record in making adjudication decisions. Can you provide any specific examples to support this assertion?

13. Would you please provide specific examples of the VA's:

    o Failure to give adequate time for a veteran to respond to VA requests for information;

    o Denial of claims where no development letter was sent or where a veteran made a timely response;

    o Request for unnecessary information or information which was not in the possession of the veteran?

    What is your basis for asserting that these are systemic agency-wide practices?

14. Please explain what practices you mean when you refer to "a host of other similar practices" at page 9 of your written statement, where you claim that a pattern began to develop within the VA where adjudicators would "churn" claims.

15. You state at page 6 of your written statement that the "VA's reaction to the developing crisis within the agency" was for the "VA [to begin] to threaten, harass, and intimidate those few of its own officials who honored their obligation to tell the truth.",

    o Your statement implies that the VA, as an institution, threatened, harassed and intimidated employees. Do you have any specific knowledge that these allegations were officially condoned by the Veterans' Administration?

16. At page 11 of your written statement, you state that there is "an unofficial rule among regional offices to deny all ionizing radiation claims absent specific direction from the Advisory Review Staff of the Compensation and Pension Service.".

    - To the best of your knowledge, what does "specific direction" refer to and what procedures and factual considerations would this include? Does this referral procedure apply to both actions which would grant or deny claims?

    - Please state the factual basis upon which you make this claim. I would be interested in receiving any information you can provide on any specific case in which you have found this to occur in which any statutory provisions, VA rules, regulations, or any other binding provisions were violated.

    - Do you know of any cases in which a Regional Office has been criticized for granting radiation-based service connection without "specific direction" from the Compensation and Pension Service?

    - Are you asserting that review of radiation-based claims by the Compensation and Pension Service is intended to discourage the granting of benefits, rather than to provide another review to ensure benefits are not denied if a basis exists to grant service connection?

17. You stated at page 12 of your written testimony that the VA interprets statutory presumptions so as to preclude any grant where a presumption is not present. If that claim is true, that would mean that only those disabilities which are presumed would be granted service connection. Since that is obviously not true, please explain what you mean by your statement.

18. At page 12 of your written statement you refer to frequent procedural and substantive irregularities by the VA, including "extraordinarily high true error rates, often far higher than [the] VA's own definition of tolerable limits or reported rates...".

    - Please indicate which error rates you are referring to.

    - What, if any, percentage of these error rates resulted in overpayments of benefits to veterans, and what percentage resulted in underpayments to veterans?

- o Do you believe that any actual or reported VA adjudication errors that result in an overpayment of veterans' benefits should be excluded from due process considerations? Please explain.

19. Please explain the basis for your statement on page 22 of your written statement that service officers who "continue to claim the ability to act as lawyer-substitutes, . . . will be held to the same standard of care as attorneys under our malpractice laws.".

    - o What factors lead you to predict that there will be an "explosion in the number of malpractice actions filed against service organizations and service officers?"

    - o To the best of your knowledge, how many such malpractice actions are currently pending against service organizations and service officers?

    - o Do you know how many malpractice cases have been successful against attorneys, veteran service organizations, and service officers who have represented veterans in the VA claims adjudication process in recent years?

LAW OFFICES OF

MORRISON & FOERSTER

CALIFORNIA CENTER
345 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94104-2105
TELEPHONE (415) 434-7000
TELEFACSIMILE (415) 434-7022
TELEX 34-0254

LOS ANGELES
WOODLAND HILLS
WALNUT CREEK
PALO ALTO

WASHINGTON, D. C.
DENVER
LONDON
HONG KONG

WRITER'S DIRECT DIAL NUMBER
(415) 434-7151

November 20, 1987

The Honorable Frank H. Murkowski
United States Senate
Committee on Veterans' Affairs
Washington, D.C. 20510-6375

Re: NARS, et al. v. Turnage, et al.

Dear Senator Murkowski:

This is to respond to your letter dated July 13, 1987, enclosing a large number of questions concerning my testimony at the joint Congressional oversight hearing last March.

Reply to Question No. 1

At the present time, Morrison & Foerster represents all class plaintiffs in the NARS, et al. v. Turnage, et al. litigation, except Reason F. Warehime, and NARS is represented by the Heller, Ehrman, White & McAuliffe law firm. As explained in my verbal testimony, I did not appear at the hearing as a representative or "spokesperson" of NARS but rather as an attorney. As also explained in my verbal testimony, the views expressed were personal and did not necessarily reflect the views of NARS or any of the other plaintiffs to the NARS litigation.

Reply to Question No. 2

(1) No.

(2) No.

Reply to Question No. 3

The study has been completed. It is based upon an abstract of 700 randomly selected claim files. The results of the study were offered as an exhibit at trial and a copy is enclosed (see tab 1). The findings of the study are far too voluminous to be summarized here. However, they can be obtained from the Department of Justice by requesting the trial testimony of Peter Buck.

Reply to Question No. 4

With respect to the question of deficiencies in the existing system with respect to the validation process for quality control, I refer you to the deposition testimony of Ronald Abrams in the NARS v. Turnage litigation, and the extensive reports he prepared in his capacity as the internal due process expert within the V.A. In addition, Abrams and Robert Yurgal proposed numerous changes to the V.A. quality review process which may have the potential for curbing some of the more serious abuses. See deposition testimony of Robert Yurgal (available from the DOJ). For example, Mr. Yurgal has proposed an evidence control project to curb abuses of the administrative disallowance procedure. I would be happy to send you copies of the relevant testimony should you be unable to obtain it from the Department of Justice. With respect to your question concerning the feasibility of a 100% validation system, I note that there is a considerable variety of measures between the existing system and a 100% validation system that might be considered.

Reply to Question No. 5

The internal studies referred to in my verbal remarks have been largely ignored by the V.A. It is my understanding that no substantive changes have been undertaken based on the internal studies; indeed, the internal studies show that the problems mentioned in my testimony have reoccurred year after year, especially in certain regional offices and that no remedial actions have been taken. At the same time, the Compensation and Pension Service has instituted measures to reduce the length and scope of its site surveys, thereby increasing the likelihood that patterns of administrative abuse will not be detected.

Quantity considerations should not be paramount in the context of adjudicating service-connected claims, given the importance of the issues at stake. While some balance must be struck between quality and quantity, the existing V.A. adjudication system has emphasized quantity and production to such a degree that the legitimacy of the decision-making process has been compromised. In the final analysis, the quality of the adjudication system depends upon the quality of the adjudicators in that system. In this regard it is distressing to observe that the V.A. has lowered its standards for adjudicators in recent years. Given this fact, it is not surprising to find that the quality of decision-making has suffered.

Reply to Question No. 6

This question is far beyond the scope of the matters addressed at the hearing, but I would be happy to communicate my views with respect to legislation concerning atomic veterans. Obviously these bills would be a marked improvement over existing laws and regulations under which only 41 out of approximately 10,000 applying veterans or survivors have ever received any compensation. However, the presumptive service connection approach poses a number of potential problems where it is coupled with provisions that permit the presumption to be rebutted, and the claims still have to be adjudicated by a bureaucracy that has consistently demonstrated its hostility to ionizing radiation claims. In addition, many diseases recognized as radiogenic or suspected to be radiogenic are omitted from the legislation. Perhaps the most administratively feasible alternative for atomic veterans would be simply to legislate compensation in prescribed amounts to atomic veterans suffering from diseases that it perceives to be radiogenic in origin. This would avoid the administrative costs of adjudicating the claims and would involve the least expense to the veterans. However, I do support S. 1002.

Reply to Question No. 7 and 8

The area encompassed by your question is extremely complicated and involved. The information you request is covered very nicely in the deposition testimony and exhibits thereto of Ronald Abrams, the internal V.A. expert on due process matters. I believe that each of your questions will be answered by reading Mr. Abrams' keen observations of problems in the work-management system utilized by the V.A. I would note that my testimony did not rely upon anecdotal accounts of problems at individual V.A. offices, but was premised upon a wide number of studies of the entire V.A. system including the Grace Commission Study, the Arthur Young Study, the V.A. Inspector General's Report, the V.A. Pension Study, and numerous reports offered by Compensation and Pension Service employees, including Ronald Abrams, Barry Boskovich, Earl Carrel, Tom Kenny, and others. Again, I simply point you to these various reports, all of which are available from the V.A.

MORRISON & FOERSTER

The Hon. Frank H. Murkowski
November 20, 1987
Page Four

Reply to Question No. 9

No.

Reply to Question No. 10

You appear to have missed the point of my remarks concerning 38 CFR § 3.103. The fundamental problem with the administrative disallowance procedures utilized by the V.A. is that adjudicators intent upon improving their productivity statistics have seized upon requests from the claimant as a means to enhance their production statistics. Thus, they have asked to veterans for information the veterans do not have in the hope the veterans will not respond so the claim can be disallowed without the adjudicator having to do any work. The adjudicator obtains the same work credit whether or not he is able to induce an administrative disallowance for failure to prosecute. This does not mean that there are not appropriate instances in which the V.A. might seek information from a claimant. However, it is still an abuse for the V.A. adjudicator to request information from the claimant that is already in the V.A.'s possession or which the V.A. knows the claimant does not possess.

Reply to Question No. 11

I know of no statistical data base that the V.A. employs that captures "irrational" decisions. Therefore, it is impossible for anyone, including the V.A., to document how many irrational decisions are made. Indeed, the inability of anyone to obtain precise information in this area is largely a by-product of the prohibition on judicial review and the $10 attorney's fee limitation which makes the V.A. a closed system. However, I have personally encountered hundreds of instances in which I arrived at the conclusion that a V.A. decision was irrational. However, these instances are so numerous as to preclude a compendium. However, in general, I would refer you to the enclosed trial brief filed on behalf of the plaintiffs in the NARS litigation for a description of facts bearing generally on this matter (see tab 2).

Reply to Question No. 12

A good example of this problem occurred in the *Maxwell* case, where the V.A. adjudicator who decided the claim relied upon his own recollection of the topography of

Japan in the Nagoya area to deny Mr. Maxwell's claim for service connection for radiation exposure. Maxwell was a survivor of the Bataan death march, who was interned in Nagoya Camp 6 and used by his captors on a forced-labor cleanup operation at Hiroshima. Evidence gathered in the NARS case also shows that the V.A. collects a wide variety of information which is never sent to the veteran or his representative unless the veteran specifically requests it. The veteran is not informed of the pendency of the requests and therefore has no basis to know whether the claim is pending.

Reply to Question No. 13

It would violate the Privacy Act and a Court Protective Order for me to give you examples. However, I can refer you to the deposition of Ronald Abrams and the exhibits attached thereto for many examples concerning these abuses within the V.A.

Reply to Question No. 14

With regard to the abusive practices mentioned, I suggest you contact Jack Grande, formerly of the V.A. Central Office Compensation and Pension Office staff, and refer to the deposition testimony of Robert Yurgal and Ronald Abrams in the NARS case.

Reply to Question No. 15

Your question assumes that an institution has some corporeal entity. A fictional entity like the V.A. by its nature can only act through its officers, directors and employees. The threats, harassment and intimidation of the V.A. officers who testified in the NARS case is well documented in the record in the testimony at the December 3-5, 1986 evidentiary hearing. I would be happy to provide you with a transcript should you desire it. In addition, we recently filed a brief summarizing the testimony concerning additional instances of retaliation, a copy of which is enclosed (see tab 3).

Reply to Question No. 16

I can best answer your question by referring you to the trial brief in the NARS case. In particular, I refer you to the sections that deal with the directives issued by the Compensation and Pension Service to deny all Nagasaki and Hiroshima exposure claims automatically because such veterans were allegedly exposed to no more than one rem of radiation.

Reply to Question No. 17

I do not understand how you have arrived at your construction of my testimony regarding statutory presumptions. The point I attempted to make is actually quite simple. Presumptions such as those found in 38 CFR § 3.307 are intended to simplify the procedure of granting claims where certain criteria are met, usually the onset of a certain disease or condition within the prescribed period of time. However, they are not intended to preclude the granting of a claim on some other basis. The problem within the V.A. is that many adjudicators do not seem to understand that a claimant's failure to fall within the guidelines for a presumption is not a sufficient basis in and of itself to deny his claim. Rather, the claim must still be adjudicated based upon the facts without the benefit of any presumption.

Reply to Question No. 18

With respect to the true error rates, I refer you to the 1,730 case study conducted by Ronald Abrams, Esq., which contains exact statistics concerning the wide divergence between reported error rates and true error rates. In addition, I refer you to the 1982 Inspector General's Report of the V.A. of the management system -- the Arthur Young Study, the Grace Commission Report, and the Pension Study conducted by the Compensation and Pension System, all of which indicate that true error rates were far higher than those reported following system quality reviews. Please refer to these reports to determine the distribution of overpayments and underpayments.

With respect to your final subpart of this question, the point to be made is that it is immaterial to the viability of the internal control mechanisms that a given error results in an overpayment or an underpayment. The extent controls are simply insufficient to prevent, uncover, or correct errors. Therefore, the benefits go to the wrong people. In short, an overpayment is just as significant as an underpayment in judging the sufficiency of the internal control mechanisms.

Reply to Question No. 19

The materials and testimony of various service organizations reflect their contention that service officers do just as good a job as attorneys in representing V.A. claimants. To the extent that service officers fail in their responsibilities to veterans and commit malpractice, it is only reasonable to hold them to the same standard of care that one would assign to attorneys. Given the poor job that service officers do in developing and pursuing V.A. claims, particularly complex claims such as ionizing radiation claims, it is only reasonable to assume that claimants will file malpractice suits against service officers who have failed to satisfy their fiduciary responsibilities towards veterans. I do not know of any organization which tracks or documents the number of pending malpractice actions against service organizations or service officers. However, I do know that Judy Beck, the widow of the highly decorated Vietnam veteran Ronald Beck, has filed a malpractice action against a service organization. Certainly there would be far more malpractice cases filed against service officers if veterans were able to obtain legal assistance. I do not know how many malpractice cases have been successful against any service organizations or service officers.

I trust this satisfactorily responds to your questions.

Very truly yours,

Gordon P.

Gordon P. Erspamer

Exibits A - W; Tabs 1, 2, 3, and Tabs A - E were retained in committee file.